STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Tri-County Electric Cooperative, Inc.	**:**	
-vs-	**:**	
Illinois Power Company d/b/a AmerenIP	**:**	**05-0767**
	:	
Complaint under the Electric Supplier Act.	**:**	

PROPOSED ORDER

DATED: May 28, 2015

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By the Commission:

I. NATURE OF PROCEEDING

In this proceeding, a Complaint, and then an Amended Complaint which was further amended in 2012, were filed with the Illinois Commerce Commission ("Commission") by Tri-County Electric Cooperative, Inc. ("Tri-County" or "TCEC") against Illinois Power Company d/b/a AmerenIP ("Ameren," "Ameren Illinois" or "IP") pursuant to the Electric Supplier Act, 220 ILCS 30/1 et seq. ("ESA"). In Docket No. 12-0388, Tri-County filed a closely related Complaint under the ESA against Ameren Illinois; that proceeding is currently stayed pending resolution of the instant docket.

On October 1, 2010, Illinois Power Company, d/b/a AmerenIP since 2004, and Central Illinois Light Company d/b/a/ AmerenCILCO were merged into Central Illinois Public Service Company d/b/a AmerenCIPS, which was then renamed Ameren Illinois Company d/b/a Ameren Illinois.

Tri-County is an electric cooperative within the meaning of Section 3.4 of the ESA. Both Tri-County and Ameren Illinois are electric suppliers within the meaning of Section 3.5 of the ESA. Tri-County and IP entered into a Service Area Agreement ("SAA" or "Agreement"), dated March 18, 1968 and approved by the Commission on July 3, 1968, "for the purpose of defining and delineating, as between themselves, service areas in which each is to provide electric service." In the current proceeding, Tri-County alleges that Ameren violated the provisions of that Agreement. Tri-County seeks a determination by the Commission that Tri-County is the appropriate electric supplier to a gas plant and seven gas compressors which were constructed in Tri-County's service area and are owned and operated by Citation Oil & Gas Corp. ("Citation"). A copy of the Agreement was presented as Tri-County (or "Tri") Exhibit A-1.

Pursuant to due notice, hearings were held in the instant docket before a duly authorized Administrative Law Judge at the Commission's office in Springfield, Illinois. Appearances were entered by Tri-County and by Ameren. Eventually, an appearance was also entered by Citation and it filed an intervening petition. Testimony and exhibits were presented by Tri-County, Ameren and Citation. Tri-County witnesses included its

General Manager, Marcia Scott; Director of Engineering, Dennis Ivers; Superintendent of Operations, Bradley Grubb; and consulting engineer Robert Dew. Ameren witnesses included Todd Masten and engineers Michael Tatlock and Conrad Siudyla of Ameren; consulting engineer Keith Malmedal; Bob Herr; and Jeff Lewis, Mike Garden and Josh Kull of Citation. Mark Bing testified for Citation.

At the conclusion of the hearings, the record was marked "Heard and Taken." Initial briefs ("IBs"), response briefs ("2Bs") and reply briefs ("3Bs") were filed by Tri-County, Ameren Illinois and Citation.

II. APPLICABLE PROVISIONS OF AGREEMENT

Section 3(a) of the SAA provides, in part, "Except as otherwise provided in or permitted by this Section …, each party shall have the exclusive right to serve all customers whose points of delivery are located within its Service Area and neither party shall serve a new customer within the Service Areas of the other party." (Tri Ex. A-1)

Section 3(b) of the SAA provides, "Each party shall have the right to continue to serve all of its existing customers and all of its existing points of delivery which are located within a Service Area of the other party on the effective date."

Section 1(b) of the SAA provides, "'Existing customer' as used herein means a customer who is receiving electric service on the effective date hereof."

Section 1(c) provides, "'New customer' as used herein means any person, corporation, or entity, including an existing customer, who applies for … electric service at a point of delivery which is idle or not energized on the effective date of this Agreement."

Section 1(d) states, '"Existing point of delivery' as used herein means an electric service connection which is in existence and energized on the effective date hereof. Any modification of such electric service connection after the effective date hereof by which an additional phase or phases of electric current are added to the connection, shall be deemed to create a new point of delivery."

III. BACKGROUND

According to Ameren, the "Salem Oil Field" or "Salem Unit" is a large oil field occupying some 14 square miles in Marion County, Illinois. (Ameren or "Am" Ex. 8 at 3; Am Ex. 6.1 at 16-17; Am Ex.7.1, Para 10) The "discovery" well was completed in 1938 setting off a "boom" that resulted in several thousand oil wells across the field with total production of over 300,000 barrels of oil per year by 1940, and 450,000 by 1943. (Am Ex. 8 at 3) The Texas Company ("Texaco") combined over 245 separate leases or tracts with numerous operators into a single unit with Texaco as the sole "Unit Operator" in 1953. (Tr. 1775; Am Ex. 8 at 3) The Salem Unit today "is operated by a single operator and is owned by a single unit operator." (Am IB at 1, citing Tr. 845-846)

Ameren states that Tri-County Ex. I-1 depicts the boundaries of the Salem Unit's 245 contiguous tracts. (Am IB at 1) In response, Tri-County states that Mr. Ivers of Tri-County prepared Ex I-1 and he did not identify the boundaries of Salem's 245 oil tracts. (Tri-County or "Tri" 2B at 1, citing Tri Ex. I at 3)

Ameren states that Texaco formed the Salem Unit in order to implement a "secondary recovery" technique known as a "waterflood." (Am Ex. 8 at 2-3) This process involves converting many of the existing oil producing wells to water injection wells, which force pressurized water into the oil formation to recover additional oil that would not otherwise leave the formation because "primary" reservoir pressure had been depleted by previous pumping. (Am Ex. 8 at 3-4) Producing oil wells require a motorized pumping unit that can be powered by natural gas that is produced with the oil, or by electricity. Injection wells receive water pressurized at a central pumping station and do not require their own pump motors. (Am Ex. 8 at 3-4) The transition to waterflooding at the Salem Unit meant that sufficient natural gas was no longer available to power the pumping units on the producing wells. This circumstance, together with the installation of large motors, as much as 2500 horsepower, at the central pumping stations, required electricity to power the pumping units. (Am IB at 1-2, citing Am Ex. 8 at 4-5)

Ameren asserts that at or about the time Texaco became Unit Operator in 1952, Texaco chose to construct, install and operate its own electric distribution system throughout the entire unit. (Am Ex. 8 at 4, Am Ex. 1 at 5; see also Citation or "Cit" IB at 4, citing Tr. 1111) Thereafter, the Unit Operator had sole responsibility for designing, installing and maintaining all the circuits, conductors, poles, and transformers that distributed electricity throughout the Unit. (Am IB at 1-2, citing Am Ex. 8 at 4)

In response, Tri-County states that Ameren witnesses did not testify to a date when Texaco constructed its own electric distribution line, and Ameren witness Herr acknowledged that he did not know the exact date. (Tri 2B at 1-2, citing Tr. 1788)

Ameren asserts that Texaco chose to connect its entire distribution system to a nearby substation built by Illinois Power, Ameren's predecessor, in 1952. IP initially "fed" the "Texas Substation" from a single 69 kilovolt ("kV") transmission line, but later extended a second 69 kV line to it. (Am Exs.1 at 3; and 7.1 at Paras 5, 7) The Texas Substation transformed or "stepped down" the 69 kV power to 12.47 kV for delivery to the three circuits (Nos. 130, 131 and 132) that emanate out of the substation; one of these circuits (No. 130) connects to the Salem Unit private distribution system. (Am Ex.1 at 4; Tr. 1115) From the inception of this service to Texaco in 1952 to the present, all electricity used by the Salem Unit's electrified oil field facilities has been delivered via the Texas Substation and metered by Ameren at the point where the Salem Unit conductors attach to the Substation. (Am Ex. 5.1 at 5; Am Ex. 1 at 4) Ameren Exhibit 5.1, Figures 2, 6 and 7, shows this connection and related facilities on the substation. (Am IB at 3)

As a consequence of the conversion from primary to secondary production, Texaco had reduced the number of producing wells from several thousand to around 296 by the time it sold the Salem Unit to Citation Oil & Gas Corp. in 1998. (Am Ex.4 at 3, 5) Witnesses stated that the field now has 310 producing wells and around 68 water injection wells. (Am Ex. 8 at 3; Am Ex. 4 at 3; Am IB at 3)

Ameren and Tri-County entered into the Service Area Agreement (Tri Ex. A-1) on March 18, 1968. The territorial boundaries of the SAA placed approximately 90% of the entire surface of the Salem Unit, as well as IP's Texas Substation, in Tri-County's designated territory. (Am IB at 3-4, citing Tr. 760 and Tri Ex. I-1)

Between 1968 and the present, Texaco and then Citation have continued to develop the oil and gas resources of the Unit. (Am Ex. 8 at 5; Tr. 1558) In the late 1960's, Texaco implemented an expansion of its Devonian Waterflood that required installation of a 2500-hp pump motor. (Am. Ex.8 at 6) In 1981, Texaco initiated an Enhanced Oil Recovery ("EOR") project, known as "tertiary" production, that resulted in the drilling and completion of 17 new producing wells, all connected to a water injection chemical mixing station installed for that project. (Am Ex. 8 at 6) In some years the operator drilled as many as 25 new producing wells. (Am Ex. 6.1 at 23; Am IB at 4)

From January 1, 1970 to the present, the Unit operator has drilled, completed and connected at least 98 new producing oil wells to the existing electric distribution system (Am Ex. 11 at 3-4; Am Exs. 11.1, 11.2, 11.3, and 11.4). Each one of these producing wells required an electrified motor to operate its pumping unit. (Am Ex. 8 at 5) Texaco and Citation's well-drilling activities are matters of public information. (Am Ex. 8 at 6; Am Group Ex. 13) Prior to the Complaint in this case, from 1968 to 2007 the Salem Unit Operator used its system to distribute IP energy received at the Texas Substation to wells and facilities situated in Tri-County's service area, and Tri-County has not served any of the wells or production facilities other than the Citation office complex. (Tr. 543, 636-637, 665; Am Ex. 11 at 3; Am Ex. 11.2; Am IB at 4-5)

Ameren delivers what is known as "three-phase" power to the Salem Unit connection at the Texas Substation. Three-phase service typically involves a three-wire facility such as depicted on Ameren Exhibit 5.1, Figure 7, showing the three wires emanating from the Texas Substation that connect to the Salem Unit distribution system, and Ameren Exhibit 5.1, Figure 6 depicting three wires going from a Citation transformer bank to a Citation oil well and a gas compressor. (Am IB at 5)

Ameren asserts that as of July, 1968, Tri-County had single-phase, two-phase and three-phase facilities; Ameren operated only single-phase and three-phase lines. (Am Ex. 12) The Texas Substation was designed and constructed to furnish three-phase current at all times. (Am Ex. 5.1 at 5; Am Ex. 7.2 at 4; Tr. 1269; Am IB at 5)

In response, Tri-County states that its witnesses testified Tri-County has three-phase and single-phase facilities, not two-phase facilities. (Tri Ex. A at 4; Tri Exs. A-2, B-2 and I-1) Tri-County witness Dew testified that all substations of the type used by IP

and Tri-County are constructed to handle three phases of electric current because customers need three phases of electricity. (Tri Ex. F at 3-5; Tr. 745; Tri 2B at 2)

Ameren states that there are three points about eight to ten feet apart, one for each of the three phases, where the Ameren system ends and the Citation distribution system begins. (Tr. 783-784) Ameren asserts that Ameren Exhibit 5.1, Figure 11 depicts a definable point where Ameren energy is metered for purposes of sale and billing. (Am IB at 5, citing Tr. 783-787) Three circuits emanate from the Substation, Nos. 130, 131 and 132; only No. 130 furnishes the feed to the Salem Unit distribution system. (Am Ex. 5.1 at 3) The Texaco Substation is and has "always been a three-phase substation." (Tr. 939)

Ameren asserts that the Substation does not contain any "severable [or] segregated portions ... dedicated to each of the three circuits" so that "upgrading the transformers to provide service to other ... customers would not violate the [SAA]." (Am IB at 5-6, citing Tr. 949-951)

According to Ameren, after purchasing and receiving the electricity at the point of delivery at the Texas Substation, Citation's three-phase conductors traverse some 150 feet to an enclosed area that houses a set of four "reclosers" or switches, as depicted on Ameren Exhibit 5.1, Figure 3 Revised. The recloser structure, like the Texas Substation, lies within Tri-County's designated service area. Also referred to as a "distribution structure," the reclosers/switches function as fuses to stop the flow of electricity to the Salem Unit in the event of a fault on any of the circuits. (Tr. 1287-1288) There is one recloser/switch for each of the four circuits that exit the structure to distribute energy throughout the 14 square mile area of the Salem Unit. A number of the switches have electric motors and attached transformers that reduce the 12.47 kV voltage. The distribution structure also has lighting equipped with transformers to reduce the 12.47 kV voltage. (Am IB at 6)

In response, Tri-County states that none of the transformers located at the switching structure reduce the voltage from 12.47 kV to operate any of the gas compressor motors or the motors located at the gas plant at issue in this docket. Tri-County states that its consulting engineer Robert Dew, and Keith Malmedal who is Ameren's consulting electrical engineer, both agreed that appropriate design of the electric facilities required a 12.47 kV distribution line to bring the electric energy from the Ameren substation and the Citation/Ameren switching structure to the location of the gas compressor sites and gas plant where transformers reduce the 12.47 kV to a voltage usable by the electric motors at the gas plant and the gas compressor sites. (Tr. 1863-1869; 993-994, 996) Tri-County asserts that if Citation had placed step-down transformers at the connection of Citation's 12.47 kV line with Ameren's Texas Substation to reduce the voltage to 277/488 volts, the voltage drop by the time the current reached the gas plant and compressor sites would be so great Citation would not be able to operate the electric motors. (Tr. 1111-1112) Tri-County adds that Malmedal testified that if Citation designed its 12.47 kV distribution line to carry 277/488 volts from the Citation switching structure to the gas plant and gas compressor sites, the

conductor size and support structures would be so large and expensive, it would be prohibitive. (Tr. 1865-1866; Tri 2B at 2-3)

Ameren states that IP constructed the Texas Substation in 1952 and thereafter provided electrical service to Texaco pursuant to a contract dated April 6, 1955. The parties entered into a second service contract on January 12, 1965, which provided Texaco a capacity of 9370 kilowatts ("kW") of three-phase electric energy at 69 kV for the operation of Texaco's electrical equipment in the Salem Unit. (Am Ex. 7.2, at 2; Am Ex.1.3 at 1) The 1965 contract specified the "point of delivery" at which Ameren supplied and Texaco accepted electric energy as "the connection of the Customer's facilities to the 12,470 volt bus of said substation." (Am Ex. 1.3 at 1) The applicable tariff in 1965 for Texaco's receipt of electric energy provided that as a condition of service Ameren would "provide and maintain one point of delivery and metering equipment" for its customers. (Am Ex. 1.3 at 4) That tariff also defines "point of delivery" as "the point at which Utility's lines first connect with lines or facilities owned by customer." (Am Ex. 1.3 at 4; Am IB at 6-7)

In response, Tri-County states that it has never been a party to the IP electric service contracts mentioned by Ameren or the IP tariff nor were those documents referenced in the Tri-County/IP SAA. (Tri Ex. H at 5-6; Tr. 498; Tri 2B at 3)

Ameren asserts that it and Texaco renewed the Electric Service Contract on October 2, 1991 and made no change to "point of delivery" as used in the 1965 Contract. (Am Ex.1.3 at 18). After Citation purchased the Salem Unit, including Texaco's electrical distribution system, in December 1998, Citation contracted with Ameren for Salem Unit electricity on December 14, 1999 and again on December 14, 2004. (*Id.* at 22, 25) The definition of "point of delivery" remained the same as the preceding contracts. Ameren states that it has continuously provided electric energy for the Salem Unit, at the same point of delivery -- the point of contact between the Salem Unit private distribution system and the Texas Substation -- at all times since 1952. (Am Ex. 7.2 at 3) Both the 1965 and 1991 contracts specify that title to the electricity sold passes and shall be metered at the point of delivery. (Am Ex 1.3 at 1, Am. Ex. 5.1 at 7) After the point of delivery, Citation bears all risk of line loss and sole responsibility for maintenance and repair of its distribution system. (Am IB at 7-8)

In some years the Salem Unit oil wells produced some natural gas that could not be sold or used; consequently, the operator would simply "flare" the gas or vent it into the atmosphere. In 2005, Citation decided that it could economically remove and sell some liquid hydrocarbons from the gas and also sell the "dry" gas to the City of Salem. (Am Ex. 4 at 3; Am Ex. 6.1 at 30, 43) Citation began designing a "gas plant" where it would collect gas produced throughout the Unit and process the liquids and dry gas for sale. (Am Ex. 4 at 3) To accomplish this, Citation designed a gas "gathering" system of interconnecting pipelines and electrified compressors that would carry the gas from wells throughout the Unit to the plant as one system. (Am Ex. 9 at 4, Am Ex. 10 at 2; Am IB at 8)

IV. STATEMENT OF FACTS AND WITNESS OPINIONS

A. Events Giving Rise to the Dispute

In its "Factual Statement," Tri-County states that Citation constructed a gas plant and eight gas compressor sites for the purpose described above. The location of the gas plant and compressor sites are shown on a map marked as Tri-County Exhibit A-3. The gas plant has a total electric load of 566 kW. (Tri Ex. C at 2-3, Tr. 696) Gas compressor site number six is located in Ameren's service territory and the other seven compressors and the gas plant are located in Tri-County's service territory. (Tri Ex. A-3, Tri Ex. A at 4-5; Tr. 498; Tri IB at 3)

Tri-County has a three-phase electric distribution line "identified as a black line on Tri-County's Exhibits A-2 and A-3 maps" and located 200 to 250 feet immediately south of and adjacent to the gas plant facilities. (Tri Ex. D at 3; Tr. 745) The three-phase line was originally constructed as a single-phase line on June 17, 1939 and was upgraded to a three-phase line on November 30, 1948. On February 28, 1986, Tri-County erected a three-phase line located immediately to the west of the gas plant premises to serve Energy West; the line was retired in December 1997. (Tri IB at 4-5)

Tri-County provides electric service to the Citation office complex located immediately northwest of and adjacent to the gas plant premises by a single-phase line connected to Citation's office complex since December 29, 1998. (Tri Ex. A at 3-4; Tri Ex. A-2, Tr. 498) Tri-County states that Jeffrey Lewis, petroleum engineer for Citation and a member of the Citation management group responsible for managing the Salem Oil Field from December 1998 to January 2006, knew Tri-County provided electricity to the Citation office. (Tr. 1612) Tri-County asserts that Lewis acknowledged Citation wants a different power supplier to provide electricity to the Citation office at the Salem Oil Field so that when Ameren's electric power to the oil field is disrupted or an outage occurs, Citation's office will have electricity. (Tri IB at 4-5, citing Tr. 1647-1648)

Each of the new gas compressor sites numbered 1 through 8 and the new gas plant receive electric service by means of the Ameren Texas Substation from which the electricity is taken by Citation through its private 12.47 kV distribution line to the compressor sites and the gas plant. (Tri IB at 5; Tri Ex. D at 2-3)

Tri-County asserts that on February 18, 2005, Clyde Finch, Citation's production engineer, contacted Dennis Ivers, who is Tri-County's Director of Engineering, "requesting" electric service from Tri-County for the gas plant together with a 1500 kW transformer with delivery voltage of 277/480 volts. (Tri IB at 5-6) Tri-County states that on February 18, 2005, Bradley Grubb of Tri-County met with Michael Garden, Citation's electrical supervisor for the Salem Oil field, and then again with Garden and Finch on March 10, 2005 to discuss the location of the gas plant, the kW connected load for the plant and the electrical facilities required, including the need for distribution lines and transformers, to provide electric service to the gas plant. (*Id.*, citing Tri Ex. A at 5-6; Tri Ex. B at 2 and Tr. 498, 630)

On February 18, 2005, Garden requested Tri-County to provide Citation an estimate of the cost to extend Tri-County electric facilities to the gas plant "which Grubb did" and mailed to Garden on February 18, 2005. (Tri IB at 6, citing Tri Ex. C at 2-3; Tr. 696) Ivers and Grubb reported these activities to Tri-County General Manager Marcia Scott. Tri-County asserts that Scott considered these discussions to be "requests" by Citation for electric service for the gas plant as a new facility. (Tri IB at 5-6, Para 6, citing Tri Ex. A at 6; Tr. 498)

Ameren and Citation dispute the assertion that the above-referenced discussions were "requests" by Citation for service. Ameren asserts that Citation never responded to Tri-County's estimate, did not communicate any acceptance of Tri-County's offer to construct a three-phase line, and did not pay any money to Tri-County to purchase a transformer or to construct the three-phase line. (Am IB at 9-10, citing Tr. 513, 652)

Ameren also states that Tri-County never made any detrimental reliance on any statements of Ameren representatives Tatlock or Masten such as purchasing line, transformers, or other equipment, or beginning construction of facilities to serve Citation. (Am IB at 9-11, citing Tr. 652-653) In response, Tri-County asserts that Tri-County's Scott and Grubb testified that Tri-County did not have to order the equipment because it had all of the equipment necessary to construct the service. (Tri 2B at 6, citing Tr. 533, 716)

Tri-County states that on Monday, March 7, 2005, Finch of Citation contacted Ameren's electrical engineer, Michael Tatlock, about providing electric service to the gas plant. Finch told Tatlock the gas plant would require a 1500 kW transformer but actual demand would not exceed 750 kW at peak plant operation. According to Tri-County, Tatlock understood that Citation's Finch was asking for a new point of delivery consisting of a 1500 kW step down transformer located within 200 feet of the gas plant to reduce the distribution line voltage of 12.47 kV to a lower voltage usable by the electric load of the gas plant which was in the 500-700 kW range. (Tr. 1207-1217) Tri-County further asserts that Tatlock told Finch the gas plant was located in Tri-County's service territory and that Ameren could not provide the electric service unless Tri-County consented, and also told Finch that Citation had to move the gas plant north into Ameren's service territory to get Ameren service. (Tri IB at 9, Para 6, citing Tri Ex. A at 7, Tri Ex. A-5, Tr. 498, 1245-1246)

In its response brief, Citation argues that Tri-County mischaracterizes Mr. Tatlock's testimony. (Citation or "Cit" 2B at 4) Citation states that although Mr. Tatlock testified about a transformer in response to numerous questions on cross-examination, those questions were premised upon Ameren building a new independent distribution line to the gas plant (Tr. 1214) and under those circumstances Mr. Tatlock testified that he understood that a new point of delivery would be through a meter at the gas plant. (Tr. 1210) Citation contends that Mr. Tatlock did not testify that Citation's own transformer was a new point of delivery. (Cit 2B at 4) Citation argues that paragraphs 10-15 and 23 of Tri-County's factual statement also involve the hypothetical situation of

AmerenIP constructing its own supply line from outside of Tri-County's service area up to the gas plant, and that no one is arguing that Ameren could have constructed a new line to the gas plant from outside the Tri-County service area. (*Id.*)

Tri-County states that Tatlock understood the gas plant's new point of delivery would consist of the 1500 kW transformer, the meter, and wiring or conductor from the transformer to the gas plant building. According to Tri-County, the electricity, after the voltage reduction, would be used to operate the customer's equipment which Ameren engineers Tatlock and Siudyla "envisioned" would be electric motors, lights, and facilities; Tatlock envisioned Ameren would serve the gas plant's 1500 kW transformer by building a new 12.47 kV Ameren distribution line at an estimated cost of $15,000 to $20,000 in a southerly direction from a point located near Citation's gas compressor site number 6 to the gas plant which is located approximately one-quarter mile south of gas compressor site number 6. (Tri IB at 7, Para 10-11, citing Tr. 1214-1215, 1224-1235, 1323)

Tri-County states that Ameren engineer Siudyla explained that kW is an electrical term meaning the peak demand or rate at which Citation's proposed gas plant would use power to operate electric motors, lights and facilities inside the plant. According to Tri-County, Siudyla understood on March 9, 2005 that Citation's Finch was requesting a 1500 kW step-down transformer for the gas plant located at a point near the gas plant to reduce the voltage from the distribution line or transmission line voltage to a voltage level needed by the customer which would be a new service and a new point of delivery in Tri-County's territory which Ameren could not serve, and Ameren could not extend its distribution line to the gas plant to provide the electric service. (Tri IB at 7, Para 12, citing Tr. 1316-1318, 1323-1326, 1328-1329, 1346-1351, 1375-1377)

Tri-County states that on April 25, 2005, IP's Tatlock confirmed Citation's gas plant was in Tri-County's service territory and asked IP's Siudyla to inform Citation's Finch that Citation would need to move the gas plant between one-quarter mile and one-half mile north of its existing location in order for IP to provide the electric service. Tri-County further states that on April 26, 2005, Siudyla communicated with employees of IP, including Ameren's then-regulatory specialist Todd Masten, that Tri-County had the right to serve the Citation gas plant electric load and that if Citation extended its distribution line to the gas plant load, it would violate the SAA between Tri-County and IP. The plant was never relocated in IP's territory. (Tri IB at 7-8, Para 13, citing Tri Ex. A at 7 and Tri Ex. A-5, Tr. 498, 1252, 1352-1353)

Tri-County states that Tatlock has held the front-line responsibility since 1995 for dealing with the Tri-County/IP SAA and used it as a reference to determine territorial issues between Tri-County and IP several times each year. Tatlock normally dealt with Dennis Ivers of Tri-County regarding territorial issues and communicated with Tatlock's direct supervisor Kelly Bauza and with IP's regulatory specialist either by e-mail or in person. If Tatlock determined Tri-County should serve the customer, he would explain to the customer there was an issue and then refer the customer to Dennis Ivers at Tri-

County. Tatlock did not work with Todd Masten until early 2005. (Tri IB at 8, Para 14, citing Am Ex. 3 at 2-3; Tr. 1175-1176, et cetera; Tri 2B at 5)

Because of the IP and Ameren merger, Masten did not start dealing with the Tri-County/IP SAA until early 2005. Prior to that time, Bob Perks was the regulatory specialist dealing with Tri-County regarding territorial issues, but Perks left the company before the Citation territorial issue arose. (Tri IB at 8-9, Para 14-15; Tr. 1414-1417)

On April 26, 2005 Masten knew Citation intended to build the gas plant with an expected 750 kW electric load and a 1500 kW transformer located in Tri-County service territory. Tri-County asserts that Masten knew Citation would have to request electric service for the gas plant from Tri-County, and that Tatlock and Siudyla had told Citation it could not bring electricity from the Texas Substation to the gas plant by use of the Citation distribution line. (Tri IB at 8-9, Para 16, citing Tr. 1426-1431, 1436-1437)

Tri-County asserts that on June 21, 2005, AmerenIP employees were still advising Citation that IP could not provide electric service to the Citation gas plant without consent by Tri-County; that Tri-County would consider Citation's request to IP for electric service to the gas plant as a request for a new electric service delivery point; and that Citation could not use its own distribution line to bring electricity from the IP Texas Substation to the gas plant in Tri-County's service territory. (Tri IB at 9, Para 17, citing Tri Ex. A. at 8; Tri Ex. A-5; Tr. 498, 1355-1356) According to Tri-County, Masten also knew on June 21, 2005 that both Tatlock and Siudyla of IP were still telling Citation that IP could not serve Citation's gas plant and that Citation could not use its own distribution line to serve the gas plant. Tri-County states that between March 2005 and June 21, 2005, Masten never told Tatlock or Siudyla that the information they were providing Citation regarding Tri-County's right to provide electric service to the Citation gas plant was incorrect. (*Id*., citing Tr.1440-1446)

In response to Tri-County paragraph 17, Ameren asserts that no Ameren witness ever testified that Citation made a "request to IP for electric service to the gas plant." (Am 2B at 3)

Tri-County next asserts that on June 22, 2005, Tri-County employees Scott, Ivers and Grubb met with Citation's Jeff Lewis and Edward Pearson, and that Citation advised Tri-County that Citation wanted to build its own distribution line to the gas plant. Tri-County states that it "did not consent to the Citation request." (Tri IB at 9, Tri Ex. A at 8; Tr. 498)

Ameren responds that "TCEC fails to explain how Citation's unilateral declaration of intent morphed into a 'request' for TCEC's 'consent.'" (Am 2B at 3)

Tri-County next asserts that between December 1998 and January 2006, Lewis was part of the Citation management group overseeing the Salem Oil Field, oil production, and profitability by minimizing utility rates and seeking reliable electric service. Lewis was aware that Finch met with Tri-County and that Finch had received

cost estimates to connect Tri-County electric to the gas plant. (Tri IB at 10, Para 19, citing Am Ex. 4 at 2, Tr. 1591, 1594-1598, 1603)

Lewis testified that he and Edward Pearson, Citation Production Engineer, met with Ms. Scott and others of Tri-County in Tri-County's office in Mt. Vernon in June or July to discuss electric rates, the cost to supply electricity to the gas plant, and to check if Tri-County had enough capacity and the right to supply electricity to the gas plant. Tri-County informed Lewis it did have the right to serve the gas plant and had adequate capacity to do so. (Tr. 1613-1618, Tri IB at 10, Para 20)

Tri-County states that when Lewis met with Scott on June 22, 2005, Lewis was aware Citation's gas plant was in Tri-County's service territory and he assumed Tri-County would claim the load. Lewis did not recall if he had seen the territorial agreement, but had seen a map of the territorial boundary between Tri-County and IP. He did not recall who provided the map to him nor if he had ever had a meeting with Tri-County prior to the June or July 2005 meeting. Lewis admitted he had contacted AmerenIP in June 2005 about IP providing electric service to the gas plant and that IP's Siudyla told Lewis that Citation's gas plant was in Tri-County's territory and that IP could not serve it. (Tri IB at 10, Para 21, citing Tr. 1624-1628, 1633-1634)

Scott testified she received a phone call from Lewis on January 8, 1999, during which Lewis asked if Tri-County could provide electricity to the entire Salem Oil Field which Lewis said Citation had recently purchased. Scott said Tri-County needed more information in writing from Citation. Scott made a note to check the SAA and the territory boundary. Scott was again contacted in August 1999 by Jack Edwards, Energy Manager for Citation, stating Citation was negotiating with IP regarding electric rates and wanted to know if Tri-County would serve part of the Salem Field. Scott said Tri-County could only serve the portion of the Salem Oil Field in Tri-County's service territory. Lewis called Scott on September 29, 1999 and told Scott that Tri-County's interruptible rate was higher than Citation wanted to pay. Edwards again contacted Scott in June 2001 asking if Tri-County could use an IP-built distribution line to serve part of Citation's oil field. Scott told him it depended on where the portion of the oil field Tri-County was being asked to serve was located in relationship to the territory boundary between Tri-County and IP. (Tri IB at 10-11, Para 22; Tri Ex. E. at 2-5; Tr. 498)

According to Tri-County, on July 5, 2005, when its representatives Scott, Ivers and Grubb met with Citations' Lewis and Pearson and IP's Tatlock and Masten to discuss service to the gas plant, Tatlock and Masten acknowledged the gas plant as then located was in Tri-County's service territory and Tri-County had the right to provide electric service to the gas plant. (Tri IB at 12, Para 23, citing Tri Ex. A at 8-9; Tri Ex. B at 3-4; Tri Ex. 6; Tr. 498, 1261) Tri-County states that Masten testified he did not have a great recollection of the conversations that took place at the July 5, 2005 meeting with Tri-County, IP, and Citation, and that Masten "testified that during that meeting he did not inform Tri-County that it did not have the right to provide electric service to the Citation gas plant." (*Id*., citing Tr. 1446-1447, 1523, 1525) Masten further testified that

his understanding that Citation wanted to take a new connection for electric service at the gas plant was based on the March 9, 2005 e-mail between IP's Tatlock and Siudyla, and that if IP built the distribution line to the Citation gas plant, it would create a new delivery point between IP and the gas plant. (Tri IB at 11-12, Para 23, citing Tr. 1509-1510, 1520)

After the July 5, 2005 meeting with Tri-County, Lewis met with AmerenIP's Masten and Jon Carls during the afternoon of July 5, 2005, to discuss electric service to the gas plant. Masten made notes of the meeting "noting it was Citation's position that the gas plant was an extension of the same service to the oil field." (Tri IB at 12, Para 24, citing Tri Ex. O, Tr. 1447-1450, 1517, 1528-1529)

Lewis wrote a letter dated July 8, 2005 to Masten stating that Citation could not have two separate electric suppliers for the Salem Oil Field. Lewis claimed if IP served the gas wells and Tri-County served the gas plant and IP lost power, the gas wells would shut down but the gas plant would continue to operate. (Am Ex. 4 at 6, Tr. 1591) However, Lewis testified Citation has four separate circuits in the Salem Oil Field and the gas plant and the gas wells are not all on the same circuits. He also said Citation has a mechanism in place to shut down the gas plant or the gas wells if the circuits serving the gas plants or the wells suffer an outage. (Tr. 1645-1646) Tri-County witness Dew and Michael Garden, Senior Production Foreman for Citation, both testified the Citation Oil Field has four electric circuits identified as the South Circuit, Texas Circuit, Plant Circuit, and Magnolia Circuit. Garden identified these circuits. (Tri IB at 12-13, Para 25, citing Tri Cross Ex. G-4; Am Ex. 10 and Am Ex. 10.2, Tr. 1677; Tri Ex. G, Tr. 745)

Garden testified that gas compressor sites No. 1 and No. 5 are on the Magnolia Circuit; compressor sites No. 2 and No. 3 are on the Texas circuit; compressor sites No. 4, No. 7, and No. 8 are on the South circuit; and gas compressor site No. 6 and the gas plant are on the plant Circuit. Garden testified Citation experiences electric outages on its four circuits from time to time caused by storms, lightning and animals. The outages may be on just one, or on more than one, of the four circuits. (Tri IB at 12-13, Para 25, citing Tr. 1685-1690, 1694-1696)

Dew rendered his engineering opinion that using two different electric suppliers to provide electricity in Citation's oil field would not cause harm to the equipment if automatic switches were installed so that if power were lost at the gas plant, power to the compressor sites could be cut off or if power were lost to one or more of the gas compressor sites, power could be shut off at the gas plant. Dew testified that because the gas plant and gas compressor sites were not all on the same circuit, Citation's facilities were already at risk if Citation lost power on one or more of its circuits unless it had an automatic shut- off mechanism in place. (Tri IB at 13, Para 26, citing Tri Ex. F at 30-31; Tr. 745)

Tri-County states that IP's Masten did not consider relevant the claim by Citation's Lewis that if Tri-County served the gas plant and Tri-County lost power and IP

served the gas compressors which would still have electric power, then the gas from the compressor sites would flare in the air. Also, Masten could not point to any specific facts in Lewis' July 8, 2005 letter to Masten "that made Masten formulate the decision in [his] July 15th letter to Lewis that IP could serve the gas plant." (Tri IB at 13, Para 27, citing Tr. 1484-1486, 1506)

According to Tri-County, on July 14, 2005, "Masten called Tri-County's Scott and said IP had changed its mind and intended to provide electric service to the Citation gas plant on the basis of IP's service to the Citation oil field through its Texas Substation. (Tri IB at 13-14, Para 28, citing Tri Ex. A at 9, Tr. 498, 1452-1453) Masten further testified he did not reach the decision in his July 15, 2005 letter to Lewis on his own but that four people participated in the July 5, 2005 IP meeting with Citation. (Tr. 1534, 1536 and 1538) Tri-County states that while Masten testified the July 15, 2005 letter was to clarify IP's position (Tr. 1546), he acknowledged IP's position was clearly expressed in the March 9, 2005 through June 21, 2005 e-mails -- between IP's Tatlock and Siudyla, and Masten -- that IP could only serve the gas plant if Citation moved the gas plant to IP's service territory. (Tri IB at 13-14, Para 28, citing Tr. 1543-1552)

In its statement of facts, Ameren states that in the July 15, 2005 letter from Todd Masten to Citation's Jeff Lewis, Ameren notified Citation and Tri-County of Ameren's position. It states, "As we have discussed, service to the gas plant to be constructed and to be located adjacent to the South Battery of the Salem Unit will be taken from an extension of Citation's own existing 12.47 kV primary distribution system and no action will be required of AmerenIP." It further states, "AmerenIP has for many years provided one delivery point off its 69 kV system for Citation to serve its Salem Unit. The voltage is stepped down to 12.47 kV and four separate primary distribution circuits, all owned by Citation, serve the oil field load." (Am IB at 12, citing and quoting Am Ex. 3.2)

According to Ameren, until January 2007, it furnished "bundled" power supply and delivery service that Citation used for electrical power to the gas plant, all production wells, all injection pumps, and two oil and water separation facilities. There are no other electrified components of the production operations at Salem Unit. In January 2007, Citation began purchasing "unbundled" electric power supply from an Alternative Retail Electric Supplier ("ARES"). Citation entered into an "all requirements" contract with Sempra Energy Solutions for the Salem Unit in December 2008. Sempra thereafter supplied all electric power to the Salem Unit, including the gas plant and seven compressors until February 2, 2011, when Citation contracted with Ameren Energy Marketing Co. ("AEM") for unbundled power supply. Sempra sold the energy for delivery to Citation via the Ameren system and Texas Substation, which is the same location where Ameren has always delivered power to the Salem Unit. (Am IB at 12-13; see also Cit IB at 5-6)

In response, Tri-County states that AEM was incorporated in 2000 as a domestic Illinois Corporation and is a subsidiary of Ameren Energy Resources Company LLC which was organized in 2008 and in turn is a subsidiary of Ameren Corporation. All three companies are based in St. Louis. Further, Citation's Bing testified he was aware

of the litigation in this docket when Citation entered into the contracts to purchase energy from Sempra and AEM. (Tri 2B at 6-7, citing Tr. 1744-1746)

B. Testimony Regarding Point of Delivery and Other Issues

Tri-County contends Tatlock's direct testimony that the term "point of delivery" for electric service is where the electricity is "handed off" to the customer contradicted both his statement that the 1500 kW transformer located 200 feet from the gas plant reduced the voltage from 12.47 kV distribution line to a voltage usable by the gas plant and thus constituted a new "delivery point," and his testimony that the request he received from Citation's Finch required a new point of delivery for the gas plant which was located in Tri-County's territory. (Tri IB at 14, Para 29, citing Tr. 1167, 1207-1217, 1224-1228)

In response to paragraph 29, Citation contends that the transcript references cited do not support the claim that Mr. Tatlock testified that a transformer constitutes a new delivery point for purposes of the SAA. (Cit 2B at 14)

Tri-County next states that its witness Mr. Dew testified, based on his engineering experience, that the "point of delivery" referred to by Tatlock in his direct testimony relates to the point at which assignment for liability resulting from electric energy is transferred from the electric supplier to the customer and takes into account only one purpose of "point of delivery" and fails to include the complete meaning of "point of delivery" as used in the electric utility industry. Dew testified that generally the "point of delivery" for purposes of assigning liability is the same location where the distribution line voltage is reduced to a voltage usable by the customer to operate equipment. (Tri IB at 14-15, Para 30, citing Tri Ex. D at 5-6, Tr. 745)

Dew investigated the Texas Substation. He stated that IP had made extensive modifications since March 18, 1968 which cost IP between $500,000 and $1,000,000 over the years and were made to enable IP to serve existing electric load and new electric load from the Texas Substation. Dew identified the modifications to the Texas Substation which in his engineering opinion constituted modifications which increased the capacity of the Texas Substation to serve additional and/or new loads. Those modifications are listed in paragraph 31 on pages 15-16 of Tri-County's initial brief.

Dew rendered his engineering opinion that if the Texas Substation is considered a "delivery point" for the gas plant and gas compressor sites, which Tri-County disputes, then the many modifications to the Texas Substation by IP would cause the Texas Substation to become a new point of delivery under Section 1(d) of the SAA. (Tri Ex D-2 at 14, Tr. 745) Dew testified that neither Tatlock, nor Malmedal who is a consulting engineer testifying for Ameren, contradicted Dew's opinion that the modifications made by IP to the Texas Substation allowed IP to increase the capacity of the Texas Substation to provide additional electric service to IP customers including Citation. (Tri IB at 16, Para 31, citing Tri Ex. F at 5-6; Tr. 745)

Tatlock, however, testified that there had been no "modifications" to the Texas Substation within the meaning of Section 1(d) of the SAA because there had been no change in the "phases" of the electricity at the substation which was originally built as a three-phase substation and had always been a three-phase substation. (Tri IB at 16, Para 32; Am Ex. 7.2 at 4; Tr. 1167)

Tri-County states that "Dew testified that if Tatlock's opinion that the Texas Substation was the 'delivery point' for Citation's gas plant and gas compressor sites and no modification occurred to the Texas Substation as a 'delivery point' unless a phase was added or taken away at the substation, then there could never be any modifications to substations under Section 1(d) of the [SAA]." He stated that substations are the heart of the electric supplier's distribution system with electric power delivered from the generating station at 34.5 kV or 69 kV to the substation where transformers reduce the voltage to 12.47 kV for distribution across 12.47 kV distribution lines to transformers at the customer's site which reduce the distribution line voltage to a voltage usable by the customer's motors. (Tri IB at 16-17, Para 33)

Dew testified that the only phases of electricity utilized in the electric utility industry are single phase for residences and small motors, two phase or V phase for larger motors, and three phase for customers who have motors that only operate on three phases of electricity. Thus, he stated, all substations of the type used by Ameren and Tri-County are constructed to handle three phases of electric current because some customers need three phases. Tatlock's interpretation that the Texas Substation could only be modified by the addition of or removal of a phase led Dew to the engineering conclusion that "delivery point," as utilized in the SAA, does not mean the substation location but means the step-down transformers and associated equipment installed to reduce the distribution line voltage to a voltage usable at the location of the customer's motors and equipment. (Tri IB at 16-17, Para 33, citing Tri Ex. F at 3-8, Tr. 745)

Dew said his opinion is further supported by the fact that adding new transformers where none existed to serve a customer's new or additional electric load, or changing a customer's electric service from single phase to two phase or three phase electric service to increase a customer's quantity or type of electric service, are the most common changes in an electric supplier's point of delivery of electric service to a customer. Dew testified that in such instances, a new delivery point under Section 1(d) of the SAA is created because the modifications consisted of a transformer to step the voltage down from the distribution line to a voltage usable by the motors and equipment of the customer along with necessary upgrading of the distribution line to provide three-phase current rather than single-phase current to the customer's location. Dew further stated that such changes constitute an increase in both the capacity to serve as well as adding additional phases to the delivery point and the most important part of the modification is the increase in the capacity of the electric supplier to provide the additional electric energy to the customer at a voltage usable by the customer's motors and equipment. (Tri Ex. F at 5-8, Tr. 745; Tri IB at 17-18, Para 33)

In its responsive brief, Citation takes issue with various assertions contained in Paragraphs 31-33 on pages 15-18 of Tri-County's initial brief. (Cit 2B at 5-8)

Dew also testified that if the Texas Substation is the delivery point for the utilization of electricity by Citation in the Salem Oil Field, then Citation could disconnect its distribution line from Ameren's Texas Substation and connect it to the Tri-County Salem Substation located nearby which would become the delivery point for the Citation Salem Oil Field resulting in a switch in the electric service used by Citation from Ameren to Tri-County. (Tri Ex. F at 9, Tr. 745) Malmedal, Ameren's outside electrical engineer, agreed that from an engineering standpoint, Citation could disconnect its 12.47 kV distribution line from the switching station at the Texas Substation and reconnect it to the Tri-County Salem Substation and take electricity from Tri-County -- and power the Citation gas plant, gas compressors and all of the Salem Oil Field -- or even serve an electric load similar to the gas plant electric load located 20 miles distant. (Tri IB at 18, Para 34, citing Tr. 1951-1952)

Malmedal expressed his opinion that the delivery point for the gas plant and gas compressor sites was where Citation's 12.47 kV distribution line connects to Ameren's Texas Substation because that is where the ownership of the electricity changed and where the electricity was handed off by Ameren to Citation. (Am Ex 5.1 at 6, Tr. 1815) According to Tri-County, Malmedal based his opinion on the 2008 National Electrical Code ("NEC") and the 2007 National Electrical Safety Code ("NESC") although Malmedal said the NEC does not apply to Citation, Ameren or Tri-County but the NESC does apply to Ameren and Tri-County. (Tri IB at 18, Para 35, citing Am Ex. 5.1 at 7, Tr. 1815, 1894-1896)

Dew testified that Malmedal incorrectly relied on the 2008 NEC and the 2007 NESC because neither defined "delivery point" and neither was in existence when the 1968 SAA between Tri-County and IP became effective. Rather, the 1965 edition of the NEC then in effect did not define "delivery point" but did define "service," "service conductors," and "service drop" at page 13 of Tri-County Exhibit F-1. Service is defined as "the conductors and equipment for delivering energy from the electricity supply system to the wiring system of the premises served."

Service Conductors are defined as "the supply conductors which extend from the street main, or from transformers to the service equipment of the premises supplied. In an overhead distribution system, the service conductors begin at the line pole where connection is made." The publication further states, "If a primary line is extended to transformers installed outdoors on private property, the service conductors begin at the secondary terminals of the transformers. … In every case the service conductors terminate at the service equipment."

Service Drop is defined as "the overhead service conductors between the last pole or other aerial support and the first point of attachment to the building or other structure."

Dew also testified that while the 1961 NESC does not define "delivery point," the 1961 NESC edition, Definition Section, at page 10, Item No. 63 of Tri-County Exhibit F-3, defines "service" as follows, "Service means the conductors and equipment for delivering electric energy from the secondary distribution or street main, or other distribution feeder, or from the transformer, to the wiring system of the premises served." It continues, "For overhead circuits, it includes the conductors from the last line pole to the service switch or fuse. The portion of an overhead service between the pole and building is designated as 'service drop.'" (Tri Exs. F at 10-12, F-1, F-2, and F-3; Tr. 745; Tri IB at 18-19, Para 36)

Dew opined that Ameren witness Malmedal does not properly acknowledge that each of the definitions regarding "service" or "service point" in the NEC and NESC refers to the connection of the medium voltage (12.47 kV) electric distribution line with the customer's place of usage of the electricity. At that point of delivery, there is a step-down transformer and associated attachments allowing the reduction of the distribution line voltage to a voltage level capable of being utilized by the customer's motors and equipment. Thus, he stated, one can only properly conclude the definitions of "service-point" or "service" in the NESC publication and the NEC publication refer to the point where the distribution line voltage is stepped down by a transformer to a voltage level capable of being used by the customer's motors and equipment at the location of the end usage of the electric current. Dew also explained that the NEC is sponsored by the National Fire Protection Association and was first published in 1897 and every three years thereafter as a standard to help guard against loss of life and property, and is not generally applicable to the facilities of an electric utility. The NESC sets forth the standards followed by electric utilities such as Tri-County and Ameren and it is the code followed by electric utility engineers. (Tri Ex. F at 10-14; Tr. 745; Tri IB at 19-20, Para 37)

According to Dew, Malmedal's statement in the first full paragraph on page 7 of his engineering report, that the place where the utility meters the amount of electricity used by the customer is an indicator of the "point of delivery," is not supported by any of the definitions of "service" or "service point" as used in the NECS or the NEC that were in effect at the date of the SAA. Rather, the location of the meters is determined by which of the electric utility or the customer will assume the line loss that occurs when electricity is transported across distribution lines for delivery to the actual point of use of the electricity. That location is generally negotiated between the customer and the electric utility. However, the common practice in the utility industry is to consider the "point of delivery" of electrical current to the customer as being the point where the electric distribution line voltage is stepped down by a transformer and associated equipment to a voltage usable by the customer's electric motors and equipment and is uniformly the location of the customer's electric motors and equipment. (Tri Ex. F at 15-16, Tr. 745; Tri IB at 20-21, Para 38)

Dew testified that Malmedal's conclusion that the Texas Substation is the delivery point because IP has no ownership in Citation's distribution line ignores the generally understood meaning of "delivery point" within the electric supplier industry

which is that the transformer and associated equipment used to reduce the voltage delivered at the place of the end use of the electricity is the general location for the delivery point between the electric supplier and the customer. (Tri IB at 21, Para 39, citing Tri Ex. F at 9; Tr. 745)

Malmedal testified that he drove most of the line Citation constructed or rebuilt to bring power to the gas plant. According to Tri-County, he confirmed the line was a 12.47 kV distribution line which had to be rebuilt by Citation to serve the gas plant because it was under-conducted or too small and lacked capacity to carry the additional current required by the gas plant, and if the distribution line had not been rebuilt, it is very likely that at peak load for the distribution system the conductor would have overheated and sagged too close to the ground. (Tri IB at 21, Para 40, citing Tr. 1820-1833)

Malmedal also examined the Citation compressor site depicted in Figure 6 at page 6 in his engineering report, in Ameren Exhibit 5.1 and in Tri-County's Exhibit K, and he also inspected the 1500 kW pad-mounted transformer that fed the gas plant. Malmedal testified the gas compressor site depicted was typical of all eight Citation gas compressor sites. He explained that electricity arrives at the gas compressor site and the gas plant on Citation's 12.47 kV distribution line which connects to the primary or high side of the transformers. The transformers reduce the voltage to 277/480 and the electricity leaves the transformers at the secondary or low side and travels by a conductor to a 480 volt, 20 to 50 horsepower electric motor to operate the compressor or to motors in the gas plant. Malmedal testified that the electrical design was appropriate for the facilities and if the voltage was not reduced by a transformer at the gas compressor sites and gas plant, the voltage would destroy the electric motors. (Tri IB at 21-22, Para 41, citing Tr. 1820, 1822, 1836-1848)

Dew explained that the electricity used to operate the electric motors at the compressor site number 6 depicted in Ameren Exhibit 5.1, figure 6, comes from the IP Texas Substation by traveling across the 12.47 kV distribution line which dead ends at the cross arms on the pole in figure 6. The electricity then travels through jumpers and fuses to the high voltage side of the transformer where the voltage is reduced and exits the transformer's low side at 277/480 volts and enters a green colored breaker box. From there the electricity travels by underground service wires to the motor that powers the compressor. The 12.47 kV of electricity entering the high voltage side of the transformer had to be reduced to a voltage of 277/480 volts before Citation's electric motors running the gas compressor could use the electricity. He said failure to do so would cause the gas compressor's electric motors to burn up or explode. Dew identified the service breaker on the conductor emanating from the low voltage side of the three transformers as the "service point" for the gas compressor pictured in Ameren Exhibit 5.1 figure 6 and marked the location by writing "Service Point" by the breaker box. (Tri IB at 22, Para 42, citing Tri Ex. K, Tr. 987-989, 1003-1006)

Tri-County states that Malmedal also "admitted" that if the 12.47 kV of electricity fed from Ameren's Texas Substation to the Citation switching structure adjacent to the

Texas Substation was reduced by Citation at the switching station to a voltage usable by the gas plant and gas compressor motors and then the voltage was distributed at 277/480 volts across the distribution line to the gas plant and gas compressors, the distribution line would have to be designed with such a tremendously large conductor size and support structures that it would be too expensive. Malmedal testified that the use of a 12.47 kV distribution line from the Citation switching structure and Ameren Texas Substation to the transformers at the gas plant and each gas compressor site was in accordance with customary electric design for such facilities in the United States and is the most economical design. Tri-County states that Malmedal agreed that if Citation owned the 12.47 kV distribution line, it could build the line 30 miles and serve an electrical load similar to the gas plant and up to 70 miles and serve an electric load similar to the gas compressor sites. (Tri IB at 22-23, Para 43, citing Tr. 1863-1869, 1902-1904, 1925-1927)

According to Tri-County, Malmedal further testified the "service point" is the point where the electric supply system connects to the premises wiring and the "delivery point" is the point where the power is delivered from seller to buyer, and if in this case Ameren owned the 12.47 kV distribution line and the transformer, the service point would be at the low side of the transformer and the "delivery point" would be at the meter which in this case would be located in Tri-County's territory at the location of the transformer for the gas plant and the transformers for the gas compressors. (Tri IB at 23, Para 44, citing Tr. 1886-1887, 1892, 1907-1908, 1944-1948)

Malmedal agreed the Texas Substation had been built as a three phase substation and it was not customary to build substations with less than three phases. Malmedal also agreed that the addition of the Citation gas plant to the electric circuit taking electricity from the Texas Substation would increase the electric load of the substation. (Tri IB at 23, Para 45; Tr. 1934-1940)

Citation expended an estimated $76,335 to rebuild 1,161 feet of No. 4 CU three phase line to 2/0 ACSR three phase line, and to build 4,119 feet of new 2/0 ACSR three phase distribution line so that Citation could bring electricity from Ameren's Texas Substation to serve the gas plant by means of the Texas Substation. (Tri IB at 23-24, Para 46, citing Tri Ex. D at 13-14, Tri Ex. B at 4, Tr. 630, 745)

Tri-County asserts that its Salem Substation and its three-phase line emanating therefrom located adjacent to the Citation gas plant are adequate to serve the Citation gas plant. The estimated cost for Tri-County to extend its electric service from that three phase line to the gas plant is $28,051. (Tri Ex B at 3; Tr. 630; Tri IB at 24, Para 47)

Mark Bing, Central Region Manager for Citation, testified that Citation first purchased electric energy from an ARES for the Salem Oil Field in December 2008 when it contracted with Sempra Energy Solutions for a term ending February 1, 2011. He testified that Citation entered into a second two-year contract with AEM, an ARES, for electric power for the Salem Oil Field commencing February 1, 2011. (Cit Ex. 1 at 3-

5, Cit Ex. 2 at 1-2, Tr. 1740, 1742) Bing testified that at the time Citation entered into the ARES contracts with Sempra in December 2008 and with AEM in February 2011, he was aware of the litigation in this docket and that Tri-County was seeking the right to provide the electricity to the gas plant and seven of the eight gas compressors located in Tri-County's service territory. (Tri IB at 24, Para 48, citing Tr. 1744-1746)

Lewis of Citation testified that when Citation bought the Salem Oil Field in 1998, there were 296 producing wells and at the time of his testimony the producing wells had increased to 310 wells (Tr. 1601). Josh Kull, Developmental Geologist for Citation, testified that since 1978, 98 wells had been drilled of which 64 were currently producing wells. (Tri IB at 24-25, Para 49, citing Am Exs. 11.1 and 11.2; Tri Ex. J; Tr. 1559, 1567-1568, 1572-1573, 1588)

Ameren's witness Robert Herr, a petroleum consulting engineer, testified regarding the history of well drilling in the Salem Oil Field from 1969, when he started as an employee for Texaco, Inc., through 1978 when he left Texaco's employment. Herr testified there were currently approximately 310 producing wells in the Salem Oil Field. He testified regarding the components of producing wells in the Salem Oil Field and the techniques for producing oil at the field. Herr testified that all the producing oil wells require pumping equipment either at the surface or by a submersible pump powered by electric motors between 5 and 50 horsepower depending on the amount of fluid produced by a given well and receiving electricity through distribution or step-down transformers located next to where the electricity is used. He stated that the transformers are necessary to operate the oil field. (Tri IB at 25, Para 50, citing Am Ex. 8 at 2-4, Tr. 1754-1755, 1778-1781)

Tri-County witness Ivers testified that Tri-County has many miles of electric distribution lines located throughout the Salem Oil Field from which Tri-County can provide electric service to Citation's gas compressors and gas plant. (Tri Ex B at 5-6, Tri Ex. B-2, Tr. 630) Mr. Dew testified that Tri-County's electric distribution facilities are constructed and maintained to higher standards than the Citation electric distribution facilities which Dew observed during his June 3, 2010 inspection trip. (Tri Ex. G at 17-18, Tr. 745; Tri IB at 25, Para 51)

Mr. Dew also testified that based on his inspection of the Citation Salem Oil Field, he determined that most oil wells were operated by 25 horsepower electric motors which do not create a large electric load. Dew noted that while Herr testified that Texaco as the prior owner of the oil field had projects utilizing large electric motors, Dew's inspection of the Salem Oil Field disclosed only one water pumping station with a large electric load. (Tri IB at 25-26, Para 52; Tri Ex. G at 18, Tr. 745)

Mr. Herr testified that the unitization of the oil field maximized oil production from the field to benefit both the mineral interest owners and the operators. (Tr. 1777) Tri-County asserts that there is no real relationship between the electric distribution system that distributes electricity to the various wells and other electrically operated facilities in the Salem Oil Field and the unitization of the oil field, and that Herr testified you could

have unitization of the mineral interests in the Salem Oil Field even if you had multiple electric suppliers to the oil field. (Tri IB at 25-26, Para 52, citing Tr. 1781)

According to Ameren's "Statement of Facts," Citation's decision to extend its own distribution system was based in part on its own business judgment concerning public safety and economics. Citation stated it was critical to the operation of the Salem Unit that the gas plant and compressors are interconnected with the rest of the field, and that the entire Salem Unit receive electricity from one supplier. Mr. Lewis of Citation stated that in theory one supplier could provide power to the gas plant and another supplier could provide power to the rest of the Unit, but such a division introduces variables and potential problems not present with a one supplier system. For example, if electricity to the gas plant goes down, the wells and compressors would continue producing and pushing gas to the plant, which could not process it. Instead, safety valves would vent the gas into the atmosphere wasting a valuable resource. On the other hand, if power to the wells and compressors failed, but the gas plant remained in operation, equipment at the plant could overheat and sustain damage. These risks are minimized, in Citation's judgment, if the Salem Unit is supplied by one electric supplier. (Am IB at 13, citing Am Ex. 9 at 2-3)

In response, Tri-County cites testimony from Mr. Dew that Citation's distribution line was not constructed or maintained to the high standards of Tri-County's electric distribution facilities. (Tri 2B at 7-8, Ex. G at 17-18; Tr. 745) Lewis acknowledged Tri-County told him it had adequate capacity to serve the Citation gas plant. (Tr. 1613-1618) Tri-County's Ivers testified that Tri-County had adequate capacity to serve the Citation gas plant and the Citation gas wells. (Tri Ex. B at 3; Tr. 630) Tri-County states that Lewis acknowledged his primary concern was electric rates noting that cost of electricity is the most important and outweighs reliability of the electric service. (Tri 2B at 7-8, citing Tr. 1595-1598) Ms. Scott of Tri-County also testified that Lewis and Jack Edwards, Energy Manager of Citation, had between January 8, 1999 and June of 2001 asked if Tri-County could serve all of the Citation Salem Oil Field because Citation was negotiating with Ameren regarding electric rates and wanted to know if Tri-County would serve part of the Salem Oil Field. (*Id.*, citing Tri Ex. E at 2-5; Tr. 498)

Ameren next asserts that Citation has not installed automated switches to shut down power to the gas compressors if power to the gas plant failed and vice-versa, which it would need to do for two suppliers to provide electricity to the Salem Unit. To implement this option, Lewis said Citation would need to purchase and install at least nine automated switches -- one for each of the eight gas compressors and one at the gas plant -- along with any equipment needed to monitor and operate the switches. (Am Ex. 9 at 2) This increases Citation's cost of business, and adds nine switches that need to operate if power fails in order to protect Citation from loss of resources and equipment. Lewis stated that this risk is not present when only one supplier provides electricity. In addition, Citation currently has the ability to shut down the entire Salem Unit at the Ameren Texas substation if there is an oil or gas leak. Lewis stated that this failsafe is necessary to protect against environmental damage and harm to the public, and that dividing the field between two electric suppliers would complicate Citation's

ability to act quickly and effectively mitigate potential damage. (Am IB at 14, citing Am Ex. 9 at 2-3)

In response, Tri-County reiterates testimony that is described in Paragraph 25 of its factual statement and is summarized above. (Tri 2B at 8; Tri IB at 12-13)

Ameren next asserts that Citation receives electricity for the Salem Oil Field and gas plant through its distribution system that is connected to Ameren's Texas substation. The distribution system does not connect to a Tri-County substation. To divide the field between two electric suppliers, Citation would need to duplicate its distribution system to connect it both to Ameren and Tri-County's substations. Citation would not only incur costs to duplicate its system, it would also have to pay both suppliers for electric service even though it needs electricity from only one source. Lewis said Citation also has not investigated and does not know whether Tri-County can supply sufficient and reliable energy to the entire Salem field so this may not be a workable option. (Am IB at 14-15, citing Am Ex. 9 at 3; see also Cit IB at 5-6)

In response, Tri-County states that its claim is not to serve the whole Salem Oil Field but only the gas plant and gas compressor sites in Tri-County's service territory. Tri-County adds, "Further, Lewis testified that during his meeting with Scott, he inquired and was told Tri-County had sufficient capacity (energy) to serve the same…." (Tri 2B at 8-9, citing Tr. 1613-1618)

V. TRI-COUNTY ARGUMENT AND POSITION

A. Issues Presented

Tri-County asserts that there are two "issues presented in the docket." Tri-County states, "First, do each of the step down transformers and associated apparatus located adjacent to the Citation gas plant and each of the gas compressor sites which are used to reduce the [12.47 kV] on the Citation owned distribution line to 277/480 volts for use by the electric facilities at the gas plant and gas compressor sites constitute new 'delivery points' within the meaning of the March 18, 1968 [SAA]?" (Tri IB at 28)

Tri-County states that with respect to the first issue, the only questions to be decided are "(1) do each of the step down transformers and associated apparatus at the gas plant and gas compressor sites constitute delivery points and (2) were they created after March 18, 1968." (Tri 2B at 15-16)

Regarding the second issue, Tri-County states, "Second, did the adoption of the Electric Service Customer Choice and Rate Relief Act of 1997 grant an electric customer the right to unilaterally choose an electric supplier in derogation of the Electric Supplier Act?" (Tri IB at 29)

B. Service Area Agreement

Tri-County's first argument is that "the [SAA] dated March 18, 1968 controls the issues in this docket." (Tri IB at 29) The provisions of the SAA receiving the most attention from the Parties, Sections 1(b), 1(c), 1(d), 3(a) and 3b), are set forth above.

Citation established a gas plant and eight compressor sites that are used to feed gas to the gas plant. The gas plant and seven of the compressor sites are located in Tri-County's territory. Each site requires a transformer capable of stepping down the distribution line voltage from 12.47 kV to 277/480 to operate the electric facilities at each site. All the engineers agreed that without the step-down transformers and the associated electrical apparatus needed for the same, the distribution line voltage would be unusable at each of the sites. Robert Dew, an outside engineer testifying for Tri-County, opined that the apparatus installed for stepping down the voltage from the distribution line to a usable voltage for the compressor sites and the gas plant represents a typical delivery point as accepted for engineering purposes in the electric utility industry. According to Tri-County, the Commission has determined that a normal service connection point for delivery of electric service is deemed to be where the transformers are located that are used to reduce the voltage to the level usable by the customer. (Tri IB at 29, citing *Interstate Power Company v. Jo-Carroll Electric Cooperative, Inc.*, Dockets 92-0450 and 93-0030 Cons. on Remand, Order at 10 (October 9, 1996) ("*Jo Carroll*"))

Tri-County states that each of the service connection points identified by its engineer at each of the eight compressor sites and the gas plant were created by Citation, the customer, after March 18, 1968 and require step-down transformers and associated equipment for the purpose of reducing distribution line voltage at 12.47 kV to a voltage usable by the appropriate electric motors and equipment operated by Citation at each of the compressor sites and the gas plant. A plain reading of the SAA leads Tri-County to the conclusion that Citation has in fact created a new point of delivery as customarily defined in the electric utility industry, for each of the eight compressor sites and the gas plant. Consequently, Citation, as an existing customer of IP, becomes a "new customer" by reason of establishing the new electric points of delivery that did not exist on March 18, 1968. (Tri IB at 30-31)

The electricity is generated by Ameren or by a third party and then transmitted across Ameren's transmission line at 69 kV to its Texas Substation. There it is reduced from 69 kV to 12.47 kV and carried by the Citation distribution line to the distribution transformers at the gas plant and each gas compressor site. Tri-County argues, "Thus, IP becomes the provider of the electricity used by Citation to serve the gas plant and eight compressor sites through the new delivery points for each." (Tri IB at 31) Section 3(a) of the SAA states that "neither party shall serve a new customer within the service area of the other party." Yet, "compressor sites 1 through 5 and 7 through 8 as well as the gas plant are all located within the exclusive service territory of Tri-County." (Tri IB at 31)

C. Determining Point of Delivery

Section II of Tri-County's argument is titled, "The Commission is entitled to receive extrinsic evidence to determine the meaning of 'point of delivery' as used within the service area agreement." (Tri IB at 31)

The phrase "point of delivery" as used within Section 1(c) and (d) of the SAA is not defined within the SAA itself. The court in *Central Illinois Public Service Company v. Illinois Commerce Commission and Spoon River Electric Cooperative, Inc.*, 219 Ill. App. 3d 291; 162 Ill. Dec. 386, 390 (1991) ("*Spoon River*"), held that the failure to define the word "locations" in a service area agreement between Central Illinois Public Service Company ("CIPS") and Spoon River Electric Cooperative, Inc. created an ambiguity in the Agreement authorizing the Commission to consider parole evidence as to the meaning of the term "locations." Tri-County argues that because the phrase "point of delivery" as used in Sections 1(c) and (d) is not otherwise defined within the Agreement, the term is ambiguous allowing parole evidence to be considered when interpreting and applying the SAA. (Tri IB at 31-32)

Both Tri-County and Ameren have offered testimony by their respective electrical engineers regarding the meaning of "point of delivery" within the electric utility industry and as used within the SAA at issue in this docket. According to Tri-County, the electrical engineers, Dew for Tri-County and Tatlock and Siudyla for Ameren, understand that a "point of delivery" as customarily used within the electric utility industry normally consists of a step down or distribution transformer located adjacent to the site where the customer intends to utilize the electricity so that the electricity received from the 12.47 kV distribution line can be reduced to a voltage usable by the customer's facilities at the site. Tri-County states that even Michael Tatlock, IP's electrical engineer in charge of applying the SAA to territorial disputes, understood Citation was asking for a new point of delivery when Citation's Clyde Finch told him Citation was building the gas plant and that a 1500 kW transformer located no more than 200 feet from the gas plant would be necessary to reduce the voltage from the 12.47 kV distribution line to voltage usable by the electric motors and facilities located at the gas plant. (Tri IB at 32, citing Tr. 1207-1217, 1228)

Tri-County asserts that Conrad Siudyla, also an IP electrical engineer, understood Citation's request for electric service for the gas plant constituted a new point of delivery of electricity (Tr. 1316-1318, 1323-1325, 1328-1329); and that Keith Malmedal, Ameren's outside electrical engineer, also agreed that the 1500 kW pad-mounted transformer adjacent to the gas plant and the transformers adjacent to each of the gas compressor sites were necessary to reduce the 12.47 kV of electricity from the distribution line to 277/480 volts at the secondary or low side of the transformer for use by the electric motors at each site. He acknowledged the electrical design at the gas plant and each gas compressor site was appropriate and in accordance with the standard design for similar facilities in the U.S. (Tri IB at 32, citing Tr. 1839-1848)

According to Tri-County, all electrical engineers, with the exception of Malmedal, agreed that the electrical design for delivery of electric services to the gas plant and gas compressor sites constituted "delivery points" created after March 18, 1968 and since the delivery points were physically located in Tri-County's service territory, electricity could not be delivered from the Ameren Texas Substation by either an AmerenIP distribution line or the Citation-owned distribution line. Malmedal opined that because the Texas Substation constituted the "delivery point" of electricity, IP could provide electricity from its Texas Substation to the Citation-owned distribution line for use at Citation's gas plant and gas compressor sites. Yet, Malmedal agreed that if IP owned the 12,47 kV distribution line used to deliver electricity to the transformers at the gas plant and gas compressor sites, then the "point of delivery" would shift from the Texas Substation to the location of the step-down transformers at the gas plant and the gas compressor sites. The only reason Malmedal could give for this distinction was that IP was the owner of the 12.47 kV distribution line instead of Citation. (Tri IB at 33)

All the electrical engineers, including Malmedal, agreed the physical and mechanical requirements and the electrical design for the gas plant and gas compressor sites are the same whether Ameren or Tri-County or Citation owns the 12.47 kV distribution line. Tri-County argues, "Thus it is hard to rationalize Malmedal's use of ownership of the distribution line as the sole basis for determining the meaning of 'delivery point' in this docket." (Tri IB at 33) Malmedal's definition of "point of delivery" is dependent upon what the customer and the electric supplier negotiate. In Tri-County's view, that makes "point of delivery" illusionary and ignores the fact that the SAA at issue is between Tri-County and Ameren. The Agreement makes no reference to ownership of the distribution line or the location Ameren and Citation may negotiate for the hand-off of electricity as defining "delivery point." Further, Tri-County did not agree Ameren could provide the electric service by using Citation's distribution line. (Tri IB at 33)

Tri-County believes the SAA establishes Tri-County's right to serve in this case. It argues that even if there is a question as to the intent of the parties under the Agreement, the "course of conduct" of both Tri-County and IP in applying the SAA provides convincing evidence supporting Tri-County's position. In December 1998, Citation requested and Tri-County provided electric service to Citation's office complex by use of an electric service connection point, consisting of a transformer and associated apparatus customary for electric service connection points, which is located in Tri-County's territory and did not exist on March 18, 1968. IP agreed that Tri-County was authorized to serve Citation's new electric service connection point for the office complex even though IP was providing electricity to Citation at the IP Texas Substation. Similarly, Tri-County asserts, AmerenIP's engineers applied the same interpretation to the Agreement in the present case and advised Citation that the gas plant was located in Tri-County service territory and IP could not serve the gas plant without Tri-County's consent. Tri-County states that when Citation stated its intent to take the AmerenIP electric service at the Ameren Texas Substation and distribute the electricity through the Citation-owned distribution line to the gas plant and the eight compressor sites "ignoring Tri-County's service rights," IP's engineers advised Citation that IP could not allow that

to happen without the consent of Tri-County. Tri-County did not acquiesce to such service. (Tri IB at 34)

Tri-County contends that the Commission in interpreting service area agreements has long followed the axiom that the agreement will control the dispute, *Rural Electric Convenience Cooperative Co. vs [ICC]*, 75 Ill. 2d. 142; 25 Ill. Dec. 794, 796 (1979). Thus, Tri-County argues, IP's separate electric service agreements with Texaco and Citation or IP's separate tariffs, none of which Tri-County is a party to, do not control the meaning of "delivery point." Tri-County believes it is "clear that the intent of the parties as expressed by the [SAA] controls" and there is no better evidence of the intention of the parties than the interpretation they themselves place on the Agreement, *Berry v. Blackard Construction Co*, 13 Ill. App. 3d 768 (1973). (Tri IB at 34-35) Actions by the parties contemporaneously with or subsequent to the Agreement evidencing the "practical construction" placed upon the Agreement by the parties may be considered to determine the intent of the parties regarding the Agreement. (Tri IB at 34-35, citing *Occidental Chemical Co. v. Agri Profit Systems, Inc*., 37 Ill. App. 3d 599 (1975); and *Mendelson v Flaxman,* 32 Ill. App. 3d 644 (1975) where the court held that the interpretation placed on a contract by the parties as represented by their actions evidences the intention of the parties under the agreement. (Tri IB at 34-35)

Tri-County states that from February 18, 2005 through July 13, 2005, AmerenIP's interpretation of the relevant provisions of the SAA coincided with Tri-County's interpretation and in accordance with the plain meaning of the Agreement. That interpretation remained intact until AmerenIP's July 15, 2005 letter in which IP changed is interpretation of the SAA and claimed the IP Texas Substation is the delivery point for the newly established electric service connection points for the gas plant and seven of the eight gas compressor sites located in Tri-County's service territory because the 12.47 kV distribution line is owned by Citation instead of IP. (Tri IB at 35)

D. Defining Point of Delivery as the Place where Electricity is handed off to the Customer and Electric Supplier

Section III of Tri-County's Argument is titled, "The Commission has rejected the definition of 'point of delivery' as the place where electricity is handed off to the customer or negotiated by the customer and electric supplier." (Tri IB at 35)

According to Tri-County, the Commission has previously refused to define "point of service" or "point of delivery" to mean the place where the customer elects to connect its distribution system to the facilities of the electric supplier. (*Id.* at 35-36, citing *Spoon River,* 219 Ill. App. 3d 291) In *Spoon River*, CIPS and Spoon River were contesting electric service to the Canton Prison site. Tri-County states that CIPS and Spoon River had entered into a service area agreement "that provided each was entitled to serve territories divided by boundaries and in addition were entitled to serve premises in the other party's territory which they were serving on July 2, 1965 which were otherwise grandfathered by the agreement." Both Spoon River and CIPS were grandfathered to serve locations included within the Canton Prison site. In addition, the Canton Prison

site included territories that each of CIPS and Spoon River were entitled to serve based upon their territorial boundary lines. (Tri IB at 35-36)

CIPS maintained that since both had equal grandfathered rights under the agreement, the territorial dispute should be determined by the point where the customer elected to connect its distribution system to CIPS' facilities to accept delivery of electric service from CIPS. That point was located on CIPS' side of the territorial boundary line. Spoon River on the other hand maintained that the disputed territorial issue should be determined by where the electricity was being utilized and since most of the electricity was being utilized within Spoon River's designated territory, then Spoon River should be the electric supplier for the prison.

Tri-County states that in its Order in the *Spoon River* case, ESA 249, the Commission determined that "point of service" or "point of delivery" as proposed by CIPS should be rejected because (1) it would frustrate the purposes of the ESA in that it would destroy the integrity of territorial boundary lines under SAAs adopted pursuant to the Act and would encourage disputes between electric suppliers resulting from the location of a "point of service"; (2) it could result in the development of unregulated private electrical distribution lines in this State, contrary to Section 2 of the Act in which the Illinois Legislature declared it to be in the public interest to avoid duplication of electric facilities; (3) it could result in discrimination against small residential and small commercial customers who do not have the financial ability to construct and maintain their own private electric distribution system; (4) it would allow customers along the territorial boundary lines of two electric suppliers to choose the electric supplier they wanted based upon the short term goals of the customer rather than the long term legislative purposes of the Act; and (5) it would encourage the demise of relative boundary certainty under service area agreements adopted by electric suppliers pursuant to the Act, in direct contravention of the expressed purpose of the Act. (Tri IB at 36-37)

In Tri-County's view, the reasons stated by the Commission in the *Spoon River* case for rejecting CIPS' proposed definition for "point of delivery" aptly apply as a basis for the Commission rejecting Ameren's proposed definition of "point of delivery," as used in the subject SAA, as being the place where Citation elects to connect its distribution line to Ameren's facilities. Tri-County claims there is ample testimony in this record that both Tri-County and IP interpreted "point of delivery" as used in the SAA as the place where the distribution line voltage is reduced by a transformer to a voltage level usable by the customer at that particular site. Tri-County argues that the evidence in this docket illustrates the accuracy of the Commission's stated reasons in *Spoon River* for rejecting the definition for "point of delivery" that Ameren seeks in this docket. Tri-County contends that substantial weight should be accorded the Commission's long standing interpretation of "point of delivery," *Radio Relay Corp. v. [ICC],* 69 Ill. 2d. 95 (1977), and that Ameren has not provided any logical reason for now discarding the *Spoon River* definition for point of delivery. (Tri IB at 37-38)

E. Use of Customer-Owned Distribution Line to Provide Service to Citation's Gas Plant and Compressor Sites

In Section IV of its Argument, Tri-County contends that "use of the customer owned distribution line to provide electric service to Citation's gas plant and gas compressor sites defeats the purpose of the [ESA]." (Tri IB at 38)

The Agreement was in furtherance of the legislative declaration upon which the ESA was prefaced and as expressed in 220 ILCS 30/2 as follows, "The General Assembly declares it to be in the public interest that, in order to avoid duplication of facilities and to minimize disputes between electric suppliers which may result in inconvenience and diminished efficiency in electric service to the public, any 2 or more electric suppliers may contract, subject to the approval of the … Commission, as to the respective areas in which each supplier is to provide service." (Tri IB at 38)

Tri-County Exhibit A-2 shows that Tri-County has a three phase distribution line located immediately south of and adjacent to the Citation gas plant which was constructed in 1939 as a single phase line and upgraded in 1949 to a three phase line. Citation requested Tri-County to provide electric service by way of a single phase line to the Citation office complex which lies to the north and west of and adjacent to the gas plant. Tri-County continues to provide this electric service. Thus, Tri-County has facilities within a few hundred feet of the gas plant which are adequate for and could be used to supply the electric service to the gas plant. (Tri IB at 38)

No electric service lines of Ameren exist near the gas plant or the eight compressor sites. Tri-County states that Citation expended over $76,000 to upgrade its own distribution line and construct over 4,100 feet of a new 12.47 kV distribution line to allow Ameren to provide electric service to the gas plant and gas compressor sites. At the same time, the cost to Tri-County to extend electric service to the gas plant was $28,051 and Tri-County already has an extensive network of 12.47 kV distribution lines in the Salem Oil Field adjacent to the gas compressor sites as shown by the Tri-County map Exhibit B-2. Thus, Tri-County argues, the providing of electric service by Ameren whether through its own facilities or those of Citation's facilities constitutes a duplication of facilities in violation of the expressed legislative declaration regarding service area agreements and the intended general purpose of the Tri-County/IP SAA designating specific service territories. (Tri IB at 38-39)

Tri-County further argues that the Commission has long held that the customer does not have a right to choose its electric provider except in limited circumstances, none of which apply in this case. Tri-County cites *Central Illinois Public Service Company v. [ICC] and Southwestern Electric Cooperative, Inc*., 202 Ill. App. 3d 567; 148 Ill. Dec. 61, 66 (1990) ("*Southwestern*"), where the court prohibited use of a customer-owned distribution line to change suppliers and held that consumers have been legislatively foreclosed from seeking electric service from a supplier beyond their service territory. According to Tri-County, "to the same effect" is *Central Illinois Public*

Service Company v. [ICC] and Wayne-White Counties Electric Cooperative, Inc., 223 Ill. App. 3d 718; 166 Ill. Dec. 280, 282 (1992) ("*Wayne-White*"). (Tri IB at 39)

Tri-County argues that *Illinois Power Company v. Illinois Valley Electric Cooperative,* ICC Docket 88-0276 (June 21, 1989) ("*Unimin*") presented an identical issue to the one in this case. The customer, Unimin, was served by IP under a service area agreement in which Sections 1 and 3 are very similar to Sections 1 and 3 of the SAA in this case. Unimin operated a silica sand mine consisting of a processing plant and adjoining strip mines, and IP served the processing plant. Unimin took electric service provided to it by IP at its processing plant and distributed it by means of the Unimin-owned distribution system to various strip mines located in IP's designated service territory. When Unimin opened a new strip mine located in Illinois Valley's (a/k/a "IVEC") service territory, IP requested authority from the Commission to move electricity supplied by IP at the processing plant to the new mining location by means of the Unimin-owned distribution facilities.

At the new strip mine operation, a new service delivery point was required, including transformers and other associated apparatus. The new delivery point as well as the new strip mine were both located in Illinois Valley's designated service territory under the agreement. The Commission determined the new strip mine and delivery point were both located in Illinois Valley's designated service territory and therefore, only Illinois Valley was authorized to serve the new delivery point. Tri-County asserts that while the Commission decision dealt with temporary service authority, it effectively terminated the dispute denying IP the authority to serve the new electric service connection point for the new strip mining operation by means of the customer-owned distribution system and found that Illinois Valley was the appropriate electric supplier for the new electric service delivery point. (Tri IB at 39-40)

According to Tri-County, Ameren seeks the same authorization in the instant case to serve the new Citation delivery points for the new gas plant and compressor sites located in Tri-County's designated service territory by use of the customer-owned distribution line. Tri-County contends nothing in the Agreement allows Ameren to do this and the Commission decision in *Unimin* confirms that point. Generally, Commission decisions are entitled to great deference because they are the judgment of a tribunal appointed by law and possess expertise born of informed experience, *Sunset Trails Water Company v. [ICC],* 7 Ill. App. 3d 449 (1972). Tri-County argues that the Commission should be consistent and again prohibit Ameren's claim. (Tri IB at 40-41)

In Section V, Tri-County argues that Ameren "should not be allowed to do indirectly what it cannot do directly." (Tri IB at 41)

Tri-County states that Ameren's engineers and Todd Masten, Ameren's regulatory specialist, testified that Ameren cannot utilize its own electric distribution lines to take electric service from the Texas Substation to the Citation gas plant or to the seven gas compressor sites located in Tri-County's service territory. Likewise, Tri-County argues, Ameren should not be allowed to do so through the Citation-owned

distribution system because it subverts the intent of the SAA as exemplified by the "course of conduct" of Tri-County and Ameren in interpreting the SAA. (Tri IB at 41)

According to Tri-County, such action by Ameren and the customer does not conform to the intent of the Legislature in adopting the ESA and should not be allowed. For instance, Ameren's electrical engineer Malmedal testified that Citation could extend its own 12.47 kV distribution line 30 miles and serve a load the size of the Citation gas plant. (Tr. 1902-1904, 1925, 1927) There is no way to know in whose territory the electric service would be used. Tri-County states that Citation has historically shown its propensity to seek electric service from either Tri-County or Ameren, whichever seems at the time to satisfy its corporate purposes irrespective of the terms of the SAA. (Tri Ex. E at 2-5) According to Tri-County, to allow such action in derogation of the valid SAA between Tri-County and IP grants permission to any customer who is financially able to provide its own electric distribution system to violate public policy as established by the Legislature and the Commission under the ESA. (Tri IB at 41-42)

F. Modification of Texas Substation

In Section VI of its Argument, Tri-County argues that Ameren "has modified its Texas substation such that it constitutes a new point of delivery." (Tri IB at 42)

Tri-County states that Ameren maintains it has not established a new service connection point for the gas plant and the eight compressor sites and has simply continued to provide its electric power to Citation at the Texas Substation. However, Dew testified there have been numerous "modifications" to the IP Texas Substation since the SAA which have enabled Ameren to serve additional electric loads for customers through the Texas Substation. Dew opined that each time Ameren modifies its Texas Substation so that it can serve additional load, whether for an existing customer or a new customer, it creates a new point of delivery or a new service connection point at the Texas Substation within the engineering meaning of Section 1(d) of the SAA. Tri-County argues, "The failure to interpret the Agreement in that manner would allow Ameren, by reason of its existing Texas Substation, to continually add to the Texas Substation additional load of existing customers through changes in the customer's electrical phases and new load of new customers with new transformers and serve customers located in territory designated by the [SAA] to be served by Tri-County through a customer owned distribution line." (Tri IB at 42-43)

Further arguments by Tri-County on the modification issue are contained in its reply brief to Ameren's initial brief and are summarized below.

G. Construing Contracts to Avoid Unfair Results

According to Tri-County, "To construe the [SAA] as IP proposes so that IP can utilize a customer owned distribution system to serve new electric service delivery points located in Tri-County's designated exclusive service territory is a grossly unfair interpretation of the Agreement." (Tri IB at 44) Every contract contains the implied

covenant of good faith and fair dealing between the parties to it. Where a contract or portion thereof is susceptible to two conflicting constructions, one of which imputes bad faith to one of the parties and the other does not, the latter construction should be adopted. (Tri IB at 44, citing *Carrico v. Delp*, 141 Ill. App. 3d 684 (1986))

In Tri-County's view, "It would be an absurd construction of the Agreement and would imply bad faith on the part of IP to interpret 'point of delivery' as used in the Agreement to mean a different location than the site where the electricity is transformed down to a voltage usable by the customer's facilities at that site or to interpret the agreement to allow IP to deliver electricity not by an IP distribution line but by the customer owned distribution system to new service connection points located in Tri-County's service territory." (Tri IB at 44)

VI. AMEREN POSITION AND ARGUMENT

A. Whether Salem Unit remains an "Existing Customer" that Ameren has the Right to Continue Serving under Section 3(b) of the SAA

Section 3(b) of the SAA provides, "Each party shall have the right to continue to serve all of its existing customers and all of its existing points of delivery which are located within a Service Area of the other party on the effective date."

Ameren states that subject to the qualifying phrase "[e]xcept as otherwise provided in … this Section," Section 3(a) creates an "exclusive right to serve all customers whose points of delivery are located within [designated] Service Areas" and also sets forth the restriction that "neither party shall serve a new customer within the Service Areas of the other party." In Ameren's view, "The prefatory exception language in §3(a) evinces a clear intent that the §3(b) grandfathered service to 'existing customers and … existing points of delivery' trumps the (otherwise) exclusive territorial service rights." (Am IB at 15)

Section 1(b) of the SAA provides that "'[e]xisting customer' as used herein means a customer who is receiving electric service on the effective date hereof." The SAA does not define "customer" but Section 3.3 of the ESA states, "'customer' means any person receiving electricity for any purpose from an electric supplier."

Ameren states that Illinois courts presume the parties contract with knowledge of the existing law, and the statutes in existence at the time a contract is executed are considered part of the contract. (Am IB at 15-16, citing *Fox v. Heimann*, 375 Ill. App. 3d 34-35 (1st Dist. 2007)) Ameren argues, "Since statutes accordingly furnish implied contract terms, there can be no dispute that the Salem Unit oil field constituted Ameren's 'existing customer' as of [the effective date] under the SAA." (Am IB at 15-16)

According to Ameren, the Section 3(b) grandfather clause differentiates between "existing customers" and "existing points of delivery" to furnish two categories of broad protection for their continuing service rights regardless of the new territorial boundaries.

A "customer" is a "person" and can be an "individual" or an entity such as a "corporation [or] partnership." (*Id.* at 16, citing ESA Sec. 3.11)

Ameren argues, "The dual protection for both 'existing customers' and 'existing points of delivery' ensures that the grandfathered service rights include not only persons or entities 'receiving electricity' on July 3, 1968, but also the place or spot where a supplier had an 'energized' 'electric service connection' on July 3, 1968; the 'existing point of delivery' protection means that even though an 'existing customer' might later go out of business or otherwise vacate the premises, its supplier retains a continuing right to re-establish service to a different customer at any point of delivery that was 'energized' on July 3, 1968." Ameren further argues, "Since the Salem Unit has remained Ameren's continuous customer at all times since 1952, Ameren has a continuing right to serve its 'existing customer' and thus no need to rely on the §3(b) language grandfathering service to 'existing points of delivery.'" (Am IB at 16)

B. Whether Customer "Applied" for Service within the Meaning of Section 1(c) of the SAA

Section B of Ameren's Argument is titled, "The Customer never 'Applied' for Service within the Meaning of §1(c) of the [SAA]." Ameren states that "in order to defeat Ameren's prima facie grandfather right to continue serving the Salem Unit regardless of its location in TCEC's service area," Tri-County claims the gas plant/compressors constitute "new customer[s]" within the meaning of Section 1(c) of the SAA which, in turn, triggers Tri-County's exclusive territorial service rights because Section 3(a) prohibits Ameren from serving "new customer[s] within the Service Areas of [TCEC]". (Am IB at 16-17)

According to Ameren, "Section 1(c) recognizes two scenarios in which an 'existing customer' can morph into a 'new customer': [1] when an 'existing customer ... applies for a different electric service classification or [2] electric service at a point of delivery which is idle or not energized on [July 3, 1968].'" Ameren states that Tri-County claims both of these scenarios have occurred. Ameren argues, "The evidence, however, fails to establish that Ameren's existing customer (Citation) 'applie[d] for' either of the two stated objects. Tri-County's failure to establish the predicate event, i.e., an application tendered by Citation, means the Commission need not construe or apply the 'different service classification' or 'idle point of delivery' clauses." (Am IB at 17)

Ameren asserts, "While Citation explored the possibility of severing the gas plant from its distribution system and taking separate service to it from Tri-County, the evidence makes clear that Citation did so in order to evaluate its options in the exercise of prudent business judgment." Tri-County maintains a form on its website entitled "Applying for Service" (Am Cross Ex.1) but Citation never tendered that form to Tri-County. Ameren states that Tri-County witnesses "acknowledge that Citation never requested TCEC service to the gas plant/compressors and TCEC never took any concrete steps to purchase or set aside the transformers, poles, conductors or other equipment required to serve the gas plant." (Am IB at 17)

In Ameren's view, the undisputed evidence establishes that, while Citation explored the possibility of "carving out" the gas plant from its distribution system and taking separate service from Tri-County, to avoid extending its own system, Citation ultimately decided not to pursue that service configuration for its own business reasons. (Am IB at 17-18, citing Am Ex. 9 at 3-4) In Ameren's view, the record "unequivocally establishes" that Citation did not "apply" to Tri-County for service at or to the gas plant/compressors. (Am IB at 17-18)

According to Ameren, Tri-County's attempt to expand the exploratory communications with Citation into an "application" for service under Section 1(c) in order to divest Ameren of its grandfathered service rights falls short of the applicable standard. Illinois courts abhor forfeitures of contractual rights and typically hold, e.g., that "...a party may declare a forfeiture only where the contract expressly grants that right." (Am IB at 18, citing *Hettermann v. Weingart*, 120 Ill. App. 3d 683, 689 (1983)) Ameren asserts that these principles operate to bar Tri-County from attempting to stretch the "application" requirement of Section 1(c) to reach routine discussions and information exchanges. (Am IB at 18)

Ameren claims the undisputed evidence establishes that the Salem Unit constitutes a single customer that for over 60 years has regularly reconfigured and extended its electric distribution system to adapt to changes in technology, depleting reservoir pressures, and new opportunities to market previously valueless hydrocarbons. (Am IB at 18-19) Citation's extension of its existing distribution system to its gas plant and compressors cannot alter the fundamental fact that after construction of those facilities, Citation continued to "operate a single, indivisible" electric distribution system. Ameren states that the Illinois Supreme Court decision in *Ragsdale v. The Superior Oil Company* eliminates any doubt as to the singular nature and indivisibility of a unitized oil field:

> A unitization of separate tracts for the purpose of sharing in the production of oil creates a single ownership of the entire unit by the owners of the several tracts making up the unit... When the lessees of the separate leasehold tracts making up the unit join in the unitization for the purpose of operation and production of oil, a single leasehold ownership is created of the unitized tract… The oil produced is pooled, regardless of the separate tract or tracts upon which the wells are located and from which the oil is produced [and] ... all share in the oil ... sold in the proportion which each owner's tract bears to the entire unitized tract. For all practical purposes the same situation exists as though there was a single owner-lessor and a single lease. 40 Ill.2d 68, 70-71 (1968).
> (Am IB at 19)

Ameren argues that the language of Section 3.12 of the ESA further bolsters this conclusion because the Salem Unit falls within its definition of "premises." It provides, '"Premises' means a physical area (a) which except for any intervening public or private

rights of way or easements, constitutes a single parcel or unit and (b) which a single customer ... uses..." (Am IB at 19)

Citation owns the entire electrical distribution system and all of the electrified pumps and motors connected to it. The Salem Unit combined over 245 contiguous oil and gas leases for management by a single "unit operator." (Am Ex. 8 at 3) Ameren states that an oil and gas lease constitutes a "severed" estate, i.e., a real property interest that is separate and distinct from the surface estate. An oil and gas leasehold estate is considered "dominant" to the "servient" surface estate, and conveys to the Lessee the right to occupy and use so much of the surface as may be reasonably necessary to recover the oil and gas reserves. Ameren contends that the Salem Unit unquestionably constitutes "a physical area (a) which...a single customer...uses...." (Am IB at 19-20)

According to Ameren, the Commission has previously considered and rejected arguments that oil field expansions create new points of service. Ameren states that In *Central Illinois Public Service Co. v. Wayne-White Counties Electric Cooperative*, Docket No. 92-0463, (July 7, 1994), the Commission construed a substantially similar grandfather provision in an SAA and rejected the cooperative's argument that "new wells" drilled in a "unitized operation" create new customers. The Commission held that the operator's decision "to rearrange its [electrical] distribution facilities" does not "require a finding that each change in electric service to a well since the effective date of the 1974 SAA constitutes a new point of service [and] [t]he Commission finds that it is reasonable to treat the entire disputed area as a single location..." Ameren argues that this decision comports with the ESA definition of "premises" and conforms to the Supreme Court's characterization in *Ragsdale* of a unitized oil field. (Am IB at 20)

C. Modification of Texas Substation within the meaning of Section 1(d) of the SAA

Section III.C of Ameren's initial brief is titled, "Ameren never modified the Texas Substation so as to add a phase or phases of electricity within the meaning of §1(d) of the [SAA]." (Am IB at 21)

Ameren states that Tri-County tries to defeat Ameren's grandfathered right to continue serving the Salem Unit by "resorting" to the language of Section 1(d) which provides, "'Existing point of delivery' as used herein means an electric service connection which is in existence and energized on the effective date hereof." It next states, "Any modification of such electric service connection after the effective date hereof by which an additional phase or phases of electric current are added to the connection, shall be deemed to create a new point of delivery."

This language that the "modification" is "deemed to create a new point of delivery" arguably nullifies an otherwise "existing point of delivery" and defeat a Section 3(b) grandfather right to continue to serve what would otherwise constitute "existing points of delivery ... located within a Service Area of the other party...." Ameren argues,

"Since the record contains no evidence that Ameren has ever modified the three-phase 'electric service connection' between the Texas Substation and the Salem Unit system so as to add 'an additional phase or phases of electric current ... to the connection,' that 'existing point of delivery' remains in effect and no 'new point of delivery' has occurred." (Am IB at 22)

Ameren also argues that Tri-County must "concede" that the point where Citation's system connects to the Texas Substation constitutes "an electric service connection which is in existence and energized on [July 3, 1968]" in order to attempt to prove that "modification[s] of such electric service connection … by which an additional phase or phases of electric current are added to the connection" have occurred. Ameren asserts that only "an electric service connection … in existence and energized on [July 3, 1968]," can be the subject of "phase adding" modifications that transform an "existing point of delivery" into a "deemed … new point of delivery." (Am IB at 22)

Ameren states that Tri-County appears to suggest Ameren cannot deliver any electric service to the Salem Unit distribution system because of the supposed phase-adding modifications that have transformed the Citation/IP "electric service connection" into a "new point of delivery" which because of its location in Tri-County territory, Tri-County possesses an "exclusive right" to serve under Section 3(a). Tri-County then "leaps to the conclusion" that this transformation extinguishes Ameren's Section 3(b) grandfathered right because the Substation no longer constitutes one of Ameren's grandfathered "existing points of delivery… within [TCEC's] service area…." (Am IB at 22-23)

According to Ameren, modifications and upgrades within the Texas Substation do not constitute the addition of "a phase or phases of electric current" at the place where the Salem Unit distribution system contacts Ameren facilities. Since 1952, the three-phase conductors of the Salem Unit distribution system have continuously contacted the Ameren system at the same place on the three-phase Texas Substation. Modifications "behind" that point and wholly within the substation do not modify the point where the Citation conductors fasten to, or join with, the Texas Substation and do not add any "phases" to what is now and always has been a three-phase substation. Likewise, "downstream" load expansions or changes to the configuration or makeup of the Salem Unit's array of electrified pumps and compressor motors make no modification to the actual point of connection at the Substation. (Am IB at 23)

Ameren asserts that the evidence shows Ameren has always furnished electricity for use by the Salem Unit distribution system via a connection point at its Texas Substation where the Salem Unit conductors physically attach to the bolt and clamp assembly depicted on Ameren Exhibit 5.1, Figure 7. This is the junction where "title" to the electricity passes to the customer – meaning that the customer becomes solely responsible for any line losses, outages, or equipment failure that occur past that point; that is also the place where Ameren meters the power delivered to Citation for billing purposes. Citation is solely responsible for any line loss or diminution of voltage that occurs past that point of connection between the two systems. Citation owns the

electricity and all facilities "downstream" of the connection between its conductors and the Ameren substation. (Am IB at 23-24)

According to Ameren, the record shows that the "electric service connection" constituting its "existing point of delivery" to the Salem Unit in 1968 has at all times occurred at the place where the Salem Unit distribution system contacts the Ameren system. All electric service contracts between Ameren and the Salem Unit operators have specified and defined the "point of delivery" as the Texas Substation, consistent with all applicable Commission-approved tariffs. These contracts further specify that title to the electricity sold to the Salem Unit passes at the metering point on the Texas Substation. (Am IB at 24)

Ameren next asserts that the Illinois Supreme Court consults dictionaries to "ascertain the ordinary and popular meaning of words..." (Am IB at 24, citing *Valley Forge Ins. Co. v. Swiderski Electronics*, 223 Ill. 2d 352, 363 (2006))

Ameren states that Webster's New World College Dictionary (Fourth Ed. 2010) defines the following: "Connection: a joining or being joined; coupling; union"; "Delivery ... giving or handing over; transfer"; "Point ... a particular or precisely specified position, location, place, or spot..."; "Service ... a system or method of providing people with the use of something, as electric power, water, transportation, mail delivery, etc." Ameren argues, "The plain language of the SAA thus establishes that the 'point' [place/spot] where Ameren 'delivers' [hands over/transfers] 'service' [a system providing the use of electric power] is the 'connection' [i.e., union or junction] between the Ameren and Citation systems at the Texas Substation.…" (Am IB at 25)

Ameren also asserts, "TCEC's contention that adding capacity to the Texas Substation forfeits Ameren's right to continue serving its existing customers would effectively bar Ameren from improving a facility that serves many customers other than Citation." (Am IB at 25) Ameren argues that Illinois courts will not strictly construe older instruments to bar a utility from taking advantage of improvements in modern technology. (*Id.*, citing *Talty v. Commonwealth Edison Company*, 38 Ill. App. 3d 273, 276 (1976))

Ameren next argues that Tri-County's opinion testimony as to what the phrase "point of delivery" means "in the electric utility industry" has no relevance because the parties have declared what an "[e]xisting point of delivery as used herein means" which is "an electric service connection … which is in existence and energized on the effective date hereof." (Am IB at 25-26) Illinois decisions make it well settled that "contract terms must be given their plain, ordinary, popular and natural meaning." (Am IB at 26, citing *Hartford Ins. Co. of Illinois v. Jackson*, 206 Ill. App. 3d 465, 470 (1990)) Ameren states that a corollary principle holds that "[p]arties in entering into an agreement are presumed to have used terms having no technical meaning … and the words are to be construed according to their common understanding and common usage." (Am IB at 26, citing *Wolf v. Schwill*, 282 Ill. 189, 191 (1917)) Ameren argues that by applying the phrase "as used herein" to define "[e]xisting point of delivery," the parties expressly

chose not to reach outside the Agreement to avoid the type of "self-serving subjective opinion testimony" Tri-County now offers. (Am IB at 26)

D. Use of "Utilization Voltage" Argument in Determining Point of Delivery

Section III.D of Ameren's initial brief is titled, "TCEC's 'utilization voltage' argument lacks evidentiary support and legal foundation." (Am IB at 27) According to Ameren, Tri-County argues that "point of delivery" constitutes the place where a transformation to utilization voltage occurs in an attempt to carve out the plant/compressors as "new point[s] of delivery" that somehow defeat Ameren's Section 3(b) grandfather right to continue serving "existing points of delivery." (Am IB at 27)

Ameren claims Tri-County does not link its "point of delivery" argument to a particular section in the SAA and, having established a right to serve the Salem Unit as its "existing customer," Ameren has no need to also establish a second grandfather right to serve under the "existing points of delivery" entitlement. Ameren argues, '"Points of delivery' do not exist nor receive service in the abstract: §3(a) territorial rights extend to 'customers whose points of delivery are located within [designated] Service Areas'; §3(b) grandfathers the utility's, i.e., 'its existing points of delivery,' without reference to customer facilities." (Am IB at 27) Ameren asserts, "Under TCEC's decentralized definition, the Salem Unit has created hundreds of new customers (every oil well and pump motor) in TCEC territory since 1968. This argument … ignores the incontestable fact that transformers and electrified motors cannot constitute 'person[s] receiving electricity...' within the meaning of §3.3 of the ESA." (*Id.*)

In Ameren's view, "TCEC's 'utilization voltage' argument also suffers from fatal inconsistencies: the Texas Substation … constitutes a 'step down' transformer that reduces 69kV voltage to 12.47 kV – Citation accepts delivery of the 12.47 kV at its connection to the substation, takes legal title to it at that point, and carries it a matter of feet to a recloser station that divides the current and distributes it over Citation's four separate circuits." (Am IB at 27-28) The recloser facility contains both lights and switches with "step-down" transformers. Ameren argues that Citation "utilizes" the energy immediately upon accepting delivery at the Substation or at the recloser station where transformation to "utilization voltage" for the lights and switches occurs. (Am IB at 28)

Ameren asserts, "In TCEC's strained formulation, 'utilization voltage' (and hence 'point of delivery') only occurs where Citation uses its own facilities to create voltage acceptable to motors at the compressors and gas plant…." In Ameren's view, "TCEC's contention that Citation is not 'utilizing' the 12.47 kV energy immediately upon purchasing that electricity and conducting it over its own premises wiring system lacks any discernible merit; the claim that Citation only 'utilizes' the electricity miles downstream where it transforms it for use in other motors constitutes a self-serving … contrivance that impermissibly ignores [testimony] that no law or engineering practice

bars a large industrial customer from purchasing high voltage energy and using its own distribution system to move that energy anywhere on its premises." (Am IB at 28)

Ameren states that Tri-County claims Ameren has no grandfather right to serve the plant/compressors because they did not constitute "an electric service connection ... in existence and energized on [July 3, 1968]." In Ameren's view, "This argument fails for two reasons: (1) Ameren had a grandfathered right to continue to serve its July 3, 1968 'existing customers' in TCEC territory regardless of whether those customers added to, subtracted from, or reconfigured their electrified facilities and, in any event, (2) the Salem Unit's single 'existing point of delivery' as of July 3, 1968 occurred at the junction between the utility (Ameren) and the customer (Salem Unit) systems." (Am IB at 28-29)

Ameren next argues that Tri-County knew or had constructive knowledge that as of July 3, 1968, Ameren and Texaco had contractually defined the customer's "point of delivery" as "where the Utility's [69 kV] lines connect to the substation." (Am IB at 29, citing Am Ex. 1.3 at 1) The Ameren/Texaco Electric Service Agreement incorporated the definition of "point of delivery" contained in Ameren's then-applicable tariff. (Am Ex. 1.3 at 4) The provisions of these tariffs "are part of the terms and conditions upon which [utility] service is rendered, [and are] ... necessarily a component and integral part of the [utility's] contracts and relationship with its subscribers, expressly or by implication or by operation of law ... the [subscribers], whether they have actual knowledge or not, are, of course, presumed to know the law and are chargeable with notice thereof...." (Am IB at 29, citing and quoting *Illinois Bell Telephone Co. v. Miner*, 11 Ill. App. 2d 44, 52 (1956)) Further, "A tariff is a public document ... governing rules, regulations and practices relating to these [utility] services ... [and] [o]nce the Commission approves a tariff it is law, not a contract, and has the force and effect of a statute." (Am IB at 29, citing and quoting *Adams v. Northern Illinois Gas Co*., 211 Ill. 2d 32, 55 (2004))

Ameren asserts that the Commission's decision in *Southeastern Illinois Electric Cooperative v. [CIPS]*, Docket No. 89-0420 ("*Old Ben*"), although involving a coal mine, confirms the Commission's reluctance to divide longstanding, geographically dispersed customers who later expand across service area boundaries between two suppliers. The Commission wrote that "the service requirement of Mine 24 involv[ed] a transient load moving as the mining operations progressed" and concluded that "[t]he [disputed] service at [new] drill hole No. 7 was a portion of the same load that CIPS had provided to Old Ben for 27 years" and authorized CIPS to serve that facility "even though drill hole 7 was in Southeastern's service area." Ameren states, "The Commission construed the SAA as 'indicating that the parties intended that each was authorized to extend service into the other's area to provide electrical service to the premises of a customer of the contracting supplier as of the date of execution of the [agreement].'" (Am IB at 29-30)

Ameren contends that the more recent decision in *Rural Electric Convenience Cooperative, Inc. v. [CIPS]*, Docket No. 01-0675 (July 17, 2003) ("*Freeman Coal*") reiterated the Commission's approval of the *Old Ben* principles. The Commission noted

that “there is no dispute that CIPS is entitled to serve Freeman at the connection point established [in earlier litigation] [and] [h]ad Freeman been able to extend its own distribution line further ... without losing voltage, RECC would not have filed this complaint ... [and] RECC would have no claim.” (Am IB at 30)

E. Ameren Response to Tri-County

1. Grandfather Rights under SAA

Section III.A of Ameren’s response brief is titled, “The SAA unambiguously creates a ‘grandfather’ right to continue serving existing customers in the other supplier’s territory.” (Am 2B at 4) In Section A.1, Ameren argues, “The plain language of the SAA contains no ambiguity.”

Tri-County argues that because “the phrase ‘point of delivery’ as used within Section 1(c) and 1(d) of the [SAA] is not defined within the [SAA], the term is ambiguous allowing parole evidence to be considered when interpreting and applying the [SAA].” (Tri IB at 31-32) Ameren responds that disagreements over the meaning of a phrase do not create ambiguity, and that the Commission can construe the plain language of the SAA guided by traditional rules of contract construction. (Am 2B at 4)

Ameren states that Tri-County argues an ambiguity exists because of extrinsic evidence in the form of the opinion of its witness Dew about how the phrase "point of delivery" is "customarily used within the electric utility industry." (Tri IB at 32) According to Ameren, Tri-County ignores the threshold requirement that it first demonstrate why the contract language has textual ambiguity. (Am 2B at 4-5)

In Section A.2 of its Argument, Ameren asserts, “Illinois Courts presume the parties employed commonly understood language.” (*Id.* at 5) Ameren states that Tri-County offered no evidence to suggest that the parties employed the phrases "point of delivery" and "electric service connection" in Sections 1(c) and 1(d) as technical terms. (*Id.* at 5-6)

In Section A.3 of its Argument, Ameren asserts that Tri-County “fails in its attempt to manufacture ambiguity.” (*Id.* at 6) Ameren cites language in Tri-County’s brief, “It is fair to say that electrical engineers, Dew, Tatlock and Siudyla, understand that a ‘point of delivery’ as customarily used within the electric utility industry, normally consists of a step-down or distribution transformer located adjacent to the site where the customer intends to utilize the electricity so that the electricity received from the [12.47 kV] distribution line can be reduced to a voltage usable by the customer’s facilities at the site.” (Am 2B, citing Tri IB at 32)

According to Ameren, the record does not support that contention because the facts reveal the Texas Substation actually “steps down” 69 kV to 12.47 kV immediately adjacent to the Salem Unit site "where the customer intends to utilize" that voltage. Since Citation has designed its system to receive 12.47 kV electricity at the point where

Ameren transforms 69 kV to deliver 12.47 kV, Citation begins utilizing that electricity immediately. Once the electricity sold to Citation leaves Ameren's facilities and energizes Citation's conductors, Citation's "utilization" has begun. Ameren states that Dew asserted that a new point of delivery occurs any time Citation extends its distribution system to new electrified motors even where those motors do not require "step down" transformation simply "[b]ecause you have a new load and you are supplying power in someone else's territory." (Am 2B at 6-7, Tr. 898)

Ameren argues that by abandoning step-down transformation as a requisite for a "new point of delivery," Dew and Tri-County betray their desire to rewrite the SAA to eliminate the "existing customer" grandfather provision of Section 3(b). If a 1968 "existing customer" with unitary facilities simultaneously operating in both service areas morphs into a "new customer" every time it unilaterally extends conductors to a new motor or security light, Section 3(b) grandfather rights would evaporate. Ameren argues, "Even though Tri-County purports to use §1(c) for the right to serve only the gas plant/compressors as 'new customers,' §1(c) converts the entire 'existing customer' into a 'new customer' if the prerequisite 'appli[cation] for ... classification or electric service [etc.]' is proven." Ameren asserts that the "existing customer" to "new customer" transformation is not divisible and accepting Tri-County's interpretation would transform the entire Salem Unit into a "new customer" and prohibit Ameren from serving 90% of it. (Am 2B at 7-8)

Ameren also argues that Tri-County's claim that "point of delivery" in Section 1(d) "is not defined" ignores the plain language of the SAA declaring, '"Existing point of delivery' as used herein means an electric service connection...." (Am 2B at 8)

In Section III.A.4 of its response brief, Ameren argues, "TCEC's interpretation leads to an absurd outcome" because it would transform the entire Salem Unit into TCEC's "new customer" every time it adds any new electrified equipment. (Am 2B at 10)

In Section III.A.5 of its response brief, Ameren argues that neither party acted on the Ameren employees' territorial admission. Ameren asserts that *Berry v. Blackard Construction*, cited by Tri-County, confirms this principle: "Where all the parties adopt and act on a certain construction of the contract, there is not better extrinsic evidence of their intention than the interpretation they themselves placed on it." Ameren contends Tri-County never "acted on" the interpretation that the territory map defeated Ameren's grandfathered right to continue serving "existing customers." (Am 2B at 10-11)

According to Ameren, Tri-County's "practical construction" argument actually "boomerangs in favor of Ameren because TCEC stood by for over 37 years while Texaco and Citation repeatedly extended the distribution system to new pumps for some 98 new wells and two central pumping stations, all in TCEC's service area." Ameren claims the evidence shows Tri-County's own system serves residences interspersed throughout the oil field; Tri-County regularly inspects its system; and Texaco/Citation's post-1968 oil well developments are matters of public record. (Am 2B at 11)

Tri-County cites the Commission's 1996 decision in *Jo-Carroll*, Dockets 92-0450 and 93-0030, as authority for the proposition that a "'normal service connection point' for delivery of electric service is deemed to be where the transformers are located that are used to reduce the voltage to the level usable by the customer." (Tri IB at 29) Ameren states that *Jo-Carroll* did not concern the interpretation of a service area agreement and the Commission had to construe the statutory definition of "normal service connection point" in ESA Section 3.10 because of its appearance in the definition of "Proximity" in Section 3.13 which in turn appears in Section 8. The phrase "normal service connection point" does not appear in the Tri-County/IP SAA. Ameren argues that in any event, the evidence established that Ameren's Texas Substation transforms 69 kV electricity to 12.47 kV, which is a "level usable by the customer." (Am 2B at 11-12)

Section III.A.6 of Ameren's response brief is titled, "Circumstances surrounding execution of the SAA in 1968 reflect the parties' intent to let Ameren continue to serve the Salem Unit as it evolved." (Am 2B at 12)

According to Ameren, the circumstances reflect that in 1968, the parties drew boundaries that placed 90% of the Salem Unit in Tri-County territory and presumably knew that the operation was not static, but constantly evolving. Ameren contends that Tri-County's interpretation would mean the parties intended to bar the Salem Unit from extending its existing distribution system to reach every new well or pumping station sited in Tri-County territory after 1968 and force the unit operator to purchase Tri-County electric power and distribution. Ameren argues that given the parties' expressed intention to grandfather service rights to existing customers despite territorial boundaries, an implied intention to the contrary cannot stand. (Am 2B at 12-13)

In Ameren's view, other "circumstances surrounding the execution of the contract" make it unreasonable to infer that Ameren had any intent to interpret "point of delivery" any differently than as stated in its contemporaneous tariffs and electric service agreements. Tri-County protests that Ameren's "tariffs, none of which Tri-County is a party to, do not control the meaning of 'delivery point.'" (Tri IB at 34) Ameren responds that tariffs function much the same as statutes. (Am 2B at 13)

2. Ameren's Section 3(b) Right to Continue Serving Existing Customer

According to Ameren, nothing in the Commission's *Unimin* decision in Docket 88-0276 "present[s] an identical issue to the one in this case" as claimed by Tri-County. (Am 2B at 15, citing Tri IB at 29) Ameren states that *Unimin* concerned large-line corridor rights and a silica sand/pit mining operation. At the outset of mining in 1963 "all of Unimin's processing and mining operations were conducted within the [IP] Corridor." Unimin operated a "private distribution network [that] transported the electricity to the Unimin mine pits which were, at that time, all located in the Corridor." Unimin later undertook to start two new pits in IVEC territory and, rather than attempt to extend its

private network, "...requested that IVEC establish a point of delivery for electric service in IVEC's territory sufficient to serve New Pit No. 1 and New Pit No. 2." (Am 2B at 15)

Ameren states that IP complained and sought a temporary service authorization pursuant to ESA Section 8. The Commission denied IP's request because "[i]t appears...at this point in the proceedings, that [the new pits] are located in the territory...of IVEC." Ameren asserts that no question arose as to whether an "existing customer" grandfather clause protected IP's service rights to the new pits, and Unimin expressly "requested" IVEC service on the record of the proceeding. The case does not concern the extension of a customer-owned distribution network, and thus has little similarity to the record here. Moreover, unlike the interconnected and unitary operation of the statutorily-sanctioned Salem Unit, Unimin operated its various pits as severable and distinct electric loads. (Am 2B at 15-16)

Ameren states that Tri-County cites two appellate court decisions, *Southwestern*, 202 Ill. App. 3d 567 (1990), and *Wayne-White*, 223 Ill. App. 3d 718 (1992). (Tri IB at 39) Ameren asserts that neither decision involved the interpretation of service area agreement provisions similar to the Tri-County /IP SAA clauses at issue here. The *Southwestern* case involved a large oilfield customer, but the facts reflected that the operator purchased adjacent wells and facilities, then disconnected the existing co-op service, and extended its private system into the co-op territory. Ameren asserts, “Here, the Salem Unit boundaries have remained unchanged since its inception and nothing Citation or Ameren has done ousts TCEC of any existing service or revenues nor strands any existing TCEC facilities.” (Am 2B at 16)

In the *Wayne-White* case, Ameren states that the parties' SAA treated the oilfield as two separate customers by placing all of it in Wayne-White's area, but acknowledging CIPS' grandfather rights to continue serving the portion of the field "south of Route 14." The Commission and the Court rejected Mobil's attempt to use CIPS as the sole supplier and oust Wayne-White from serving its existing portion of the field north of Route 14. Ameren asserts that the case concerned an agreement with different grandfather language protecting customers at locations which each was serving on July 2, 1965, and protected the ousted supplier's existing facilities and revenues in its defined territory. The co-op did not challenge CIPS' grandfathered right to continue serving the portion of the New Harmony field in Wayne-White's service area south of Route 14. (Am 2B at 16-17)

3. Whether Ameren is Attempting to do Indirectly what it may not do Directly

In Section III.D of its response brief, Ameren takes issue with arguments on page 41 of Tri-County’s initial brief. There, Tri-County states that Ameren witnesses testified Ameren cannot utilize its own electric distribution lines to take electric service from the Texas Substation to the Citation gas plant or to the seven gas compressor sites located in Tri-County’s service territory. Tri-County argues, “Likewise, IP should not be allowed to do so through the Citation owned distribution system because it subverts the intent of

the [SAA] as exemplified by the course of conduct of Tri-County and IP in interpreting the [SAA]." (Tri IB at 41)

Ameren claims Tri-County's arguments about circumventing the SAA "lack any traction" because Tri-County knowingly agreed in 1968 that Ameren could continue to serve its existing customers and existing points of delivery in Tri-County's service area. (*Id.* at 18)

4. Further Response to Tri-County

In Section II.B of its reply brief, Ameren states that Tri-County claims that because Citation is not the same entity as Texaco, the former unit operator of the Salem Unit, Ameren's grandfather rights fail. (Am 3B at 6, citing Tri 2B at 10) Tri-County argues, "Therefore, Section 3(b) cannot be construed to treat Citation as an 'existing customer' since Citation was not IP's customer on March 18, 1968 or July 3, 1968." (Tri 2B at 10)

According to Ameren, Tri-County points to no language in the SAA that supports this interpretation. Ameren asserts that the SAA expressly distinguishes "existing customers" from "existing points of delivery" and treats the two as separate and distinct. Section 1(b) provides that "[e]xisting customers as used herein means a customer who is receiving electric service on the effective date hereof." While the SAA does not define "customer," Section 3.3 of the ESA states that '"customer' means any person receiving electricity for any purpose from an electric supplier." Ameren argues that because statutes furnish implied contract terms, no dispute exists that the Salem Unit oil field constituted Ameren's "existing customer" as of July 3, 1968 under the SAA. (Am 3B at 6, citing *Fox v. Heimann*, 375 Ill. App. 3d 34, 35 (2007))

Ameren states that the SAA defines "existing point of delivery" as "an electric service connection which is in existence and energized on the effective date hereof." According to Ameren, by distinguishing these two events, the SAA's plain language provides dual protection for both "existing customers" and "existing points of delivery" to ensure that the grandfathered service rights include not only persons or entities "receiving electricity" on July 3, 1968, but also the place or spot where a supplier had an "energized" "electric service connection" on July 3, 1968. Ameren states, "Consequently, even though the identity of the customer may change, the customer's supplier retains a continuing right to serve a different customer at the same point of delivery 'energized' on July 3, 1968." (Am 3B at 6-7)

Even assuming both the "existing customer" and "existing point of delivery" must simultaneously exist for Ameren to receive grandfathered rights, Ameren argues that the evidence establishes both conditions concurrently exist. In Ameren's view, the SAA recognizes only two scenarios in which an "existing customer" can morph into a "new customer": (1) where a customer "applies for a different electric service classification" or (2) applies for "electric service at a point of delivery which is idle or not energized on [July 3, 1968]." Ameren contends Tri-County has presented no evidence that either

scenario occurred in connection with the gas plant or compressors. Ameren asserts that Citation never applied either to Tri-County or Ameren for electric service for the gas plant and compressors, and it did not apply for a different service classification to serve the gas plant or compressors. Thus, Ameren argues, Citation remains Ameren's "existing customer" under the SAA with the corresponding service right. (Am 3B at 7)

In Section II.B of its final brief, Ameren takes issue with Tri-County's reliance in its reply brief, as summarized below, on the Commission's order in *MJM Electric Cooperative vs Illinois Power Company,* Docket No. 93-0150 (May 10, 2000) ("*MJM*"). (Am 3B at 7) Ameren states that Tri-County essentially argues that Ameren is judicially estopped from claiming an "existing point of delivery" may remain after the customer's identity changes. According to Ameren, the doctrine of judicial estoppel applies only where litigants take one factual position and then seek to take a contrary factual position in a later judicial proceeding. Ameren asserts that five requirements must be shown for judicial estoppel to apply: (1) the party must have taken two positions; (2) that are factually inconsistent; (3) in separate judicial proceedings; (4) with the intent that the trier of fact accept the facts alleged as true; and (5) have succeeded in the first proceeding. (Am 3B at 8, citing *Smeilis v. Lipkis,* 2012 IL App (1st) 103385*)*

According to Ameren, judicial estoppel does not apply here for the reason that Ameren has not taken inconsistent factual positions. Ameren states that in *MJM*, IP began providing electric service to a recently constructed VFW building in March 1993. (Docket 93-0150, Order at 12) The property the VFW purchased had been owned in the past by a drive-in movie theater. The property spanned both MJM and IP's territorial boundaries. The drive-in theater had received electric service from a point of delivery located on the MJM territorial side from 1949 to 1980, but had not received electric service since that time. After the VFW acquired the property, it constructed a new building located in IP's territory and applied for electric service with IP at a new delivery point located in IP's territory. IP constructed a new three-phase line to provide the service. MJM had never provided electric service to the VFW, but claimed the right to serve it due to the fact that it had served the drive-in theater from 1949 through 1980, giving it grandfather rights to the entire "premises." (Am 3B at 8-9, citing Docket 93-0150, Order at 3-4, 9)

IP argued that service rights under its agreement with MJM were not based on the "premises" but on whether the VFW qualified as a "new customer," and since the VFW applied in 1993 for electric service at a new point of delivery, it qualified as a "new customer" that IP had the right to serve. Ameren states that the Commission agreed, holding that MJM had no service right to the VFW because "the VFW is an entity which applied for electric service at a point of delivery or electric service connection point which was not energized on the effective date of the Agreement, and as such is a 'new customer'…." (Am 3B at 9, citing Docket 93-0150, Order at 12)

According to Ameren, in *MJM*, a new customer, the VFW, applied for electric service at a new point of delivery, a building located in IP's territory, a situation that does not exist in this case. The VFW did not operate its own distribution system, and in

that proceeding neither utility provided electric service to the property for a 13-year period. (Am 3B at 9) Ameren asserts that here, Ameren has continuously served the unit operator of the Salem Unit for more than six decades at the same delivery point, the Texas Substation. Ameren adds, "The undisputed evidence, moreover, establishes that the Salem Unit constitutes a single customer who during the last 60 years regularly reconfigured and extended its own electric distribution system to drill and electrify pumps and other equipment, a situation that did not exist in *MJM*." (Am 3B at 9) Ameren contends that because the customer, the unit operator, and point of delivery, the Texas Substation, have not changed for 60 years, *MJM* has no application to these facts. (*Id.*)

Ameren also argues that there is not any language in the *MJM* decision that supports Tri-County's reliance on *MJM* for its claim that Section 3(b) of the SAA in the current case, which states that "each party shall have the right to continue to serve all of its existing customers and all of its existing points of delivery which are located within a Service Area of the other party on the effective date [July 3, 1968]," does not provide grandfather rights. (Am 3B at 11)

In Section II.E, Ameren states that Tri-County contends Ameren cannot assert grandfather rights under the SAA based on a claim that the Salem Unit is a single premises because the SAA does not assign service rights based on "locations or premises." (Am 3B at 12, citing Tri 2B at 18)

Ameren responds that it "does not dispute that the SAA does not allow service based on 'locations or premises.'" Ameren states that it has consistently maintained throughout these proceedings that it has service rights to the Salem Unit based on the fact that the SAA allows it to continue to serve its existing customers and existing points of delivery. Ameren claims the undisputed evidence establishes just that: the Salem Unit constitutes a single customer to whom Ameren has delivered electricity at the Texas Substation for more than 60 years. Ameren further argues that the undisputed evidence "establishes that while the unit operator has regularly reconfigured and modified its electrical distribution system, the boundaries of the Salem Unit and the point of delivery, the Texas Substation, have remained unchanged for more than 60 years." (Am 3B at 12)

In Section II.G, Ameren states that Tri-County claims the Texas Substation cannot be the point of delivery because Tri-County seeks only the right to serve the gas plant and seven compressors located in Tri-County's territory, not the entire field. (Am 3B at 16, citing Tri 2B at 25) Ameren responds, "Even though Tri-County purports to limit its right to serve to the gas plant/compressors, the logical extension of its argument would divest Ameren of any right to continue to deliver electricity to the Salem Unit because of the purported 'modifications' done to the substation." (Am 3B at 16)

VII. CITATION'S POSITION

A. Whether a Transformer is a Point of Delivery within the Meaning of the SAA

Section III of Citation's initial brief is titled, "A transformer is a not a point of delivery within the meaning of the [SAA]." (Cit IB at 21) In 83 Adm. Code 400, Section 410.10 defines the term "point of delivery" as follows, '"Point of delivery' means the point at which the entity providing distribution facilities connects its lines or equipment to the lines or facilities owned or rented by the customer, without regard to the location or ownership of transformers, substations or meters, unless otherwise provided for by written contract or tariffs." (Cit IB at 22)

Tri-County argues that 83 Adm. Code 410 does not apply in this case because Section 410.20 excludes cooperatives from Part 410. According to Citation, while Section 410.20 excludes cooperatives from Part 410 "Standards of Service," that does not mean the definition is inaccurate. In Citation's view, this definition is useful to interpret the SAA. (Cit IB at 22)

Section III.B of Citation's initial brief is titled, "A transformer in a private distribution system is not a new point of delivery by an Electric Supplier under the SAA." (Cit IB at 24) Citation asserts, "If a transformer was a new point of delivery, all of the transformers used to pump the oil wells would be new delivery points but at no time from 1968 to 2005 did Tri-County ever claim any right to supply electricity to the Salem Unit and TCEC has never provided electric service to any oil well in the Unit (T. 543)." (*Id.* at 25)

Tri-County General Manager Marcia Scott regarded Tri-County's discussions with Citation as a "request" for service. (Tri Ex. A at 6) According to Citation, it did not become a "new customer" by inquiring about service options for either Tri-County or IP before it decided to extend its existing distribution system to the gas plant and compressors. Citation states that it did not ever apply for service from Tri-County or Ameren, did not fill out an application form, did not pay a deposit, and did not enter into a contract, and that Tri-County did not begin construction. (Cit IB at 25)

Citation asserts that Mr. Dew agreed Citation is one customer and the Texas Substation delivers voltage over Citation's distribution system at 12.47 kV. (Cit IB at 28, citing Tr. 848, 990-992)

Section III.C of Citation's initial brief is titled, "The *Old Ben* and *Freeman Coal* cases reject TCEC's claims." (Cit IB at 31) These cases were also cited by Ameren as discussed above.

In Docket 89-0420, Old Ben Coal Co. developed an underground mine in 1962 and entered into an electric service contract with CIPS for CIPS to furnish electricity to Old Ben's Mine No. 24. CIPS provided power to the mine for over 27 years as the

mine's underground operations developed. Citation states that CIPS had a service area agreement with Southeastern Co-op similar to the SAA in the instant case. The agreement provided that neither party would provide electric service in the other's territory "except those consumers the constructing party is otherwise entitled to serve." (Cit IB at 31)

When Mine 24 was first constructed, Old Ben installed its own underground distribution lines from the CIPS connection point at the mine. Over several years, the underground operations of Mine 24 expanded outward under the area designated on the map as belonging to Southeastern. Due to the distance, Old Ben was unable to transmit the voltage needed on its distribution lines to meet its load requirements so it bored drill hole No. 7, and requested CIPS to provide electric service at the surface of drill hole No. 7. When CIPS connected electrical service to drill hole No. 7, Southeastern objected, claiming the exclusive right to serve it as part of its service area under the agreement. CIPS responded citing the exception allowing CIPS to serve consumers it was "otherwise entitled to serve." (Cit IB at 31)

The Commission found that Old Ben's Mine 24 consisted of, "a load moving and relocating as mining operations progress[ed]." The Commission stated, "As to Drill Hole No. 7, the Commission is of the opinion that a plain and reasonable reading of paragraph (3) of the PSAA indicates that the parties intended that each was authorized to extend service through the area or areas of the other in order to provide electrical service to the premises of a customer of the contracting supplier existing as of the date of the execution of the PSAA." The Commission added, "Therefore, CIPS has a right to supply all of the electric service requirements Old Ben Mine has for the operation of its Mine No. 24, including Drill Hole No. 7." (Cit IB at 32)

Citation argues, "Citation's situation in the present case is more compelling than *Old Ben* was. Here, there is no claim that IP cannot deliver electricity to Citation at the Texas Substation under the SAA." (Cit IB at 32)

In *Freeman Coal*, Docket 01-0675, Rural Electric Convenience Cooperative Company ("RECC") filed a complaint against CIPS under the ESA. The complaint alleged that Freeman's Crown III mine was in the process of constructing a lime injection/air shaft [borehole or drill hole] located in Montgomery County in RECC's territory referred to as the "Arnold premises." RECC claimed it was entitled to provide electric service to the new borehole to the mine pursuant to the boundary line in the service area agreement with CIPS. (Cit IB at 32-33)

The Commission stated, "In ESA 187 we ordered that CIPS should deliver 34.5 KV electric service to the Crown III Mine of Freeman in Macoupin County. We also determined that Freeman owned 810 acres of surface area in Macoupin County and had acquired approximately 17,500 subterranean acres of coal rights and that the mine process would involve the electrical powering of mining equipment that will continuously move underground." The Commission further stated, "Service to the mine, then, would involve the entire 17,500 acres as a single unit and it was anticipated that the load

would move outward well beyond the 810 acres of surface area owned by Freeman as the mine developed."

The Commission continued, "As a result ESA 187 foresaw that Freeman's electric load for the Crown III Mine would always be taken underneath RECC's surface service area and that Freeman's underground load would continuously move during the mining process…." The Commission added, "Our decision here is also congruent with conclusion reached by this Commission in the *Old Ben* case. … Recognizing CIPS' original right to serve Old Ben Mine No. 24, we must also in the present case uphold CIPS' right to service the borehole as part of the Crown III Mine." (Cit IB at 34, citing and quoting Docket 01-0675, Order at 44-45)

According to Citation, in the instant case, Ameren is entitled under the SAA to serve Citation at the connection point at the Texas Substation. Citation argues that Citation is the "existing customer" within the definition of that term in the SAA because Citation is receiving electric services in the same manner as Texaco was in 1967 and Citation is receiving electricity at the same point that was energized on the effective date of the SAA. Citation states that production in the Salem Unit has evolved over the last 37 years and the number and location of active wells has constantly changed. Citation asserts that it has extended its distribution lines and drilled new wells to develop oil and gas in the Salem Unit the same way Old Ben and Freeman extended their lines to mine the coal as part of the natural evolution of the mining process. Citation argues, "Just as the service to those coal companies was service to a single customer, the service to Citation at the Texas Substation is the same service to the same customer." (Cit IB at 35, citing Am. Ex. 11 at 2-4, Ex. 11.2)

In Section III.D of its initial brief, Citation asserts that Citation's Salem Unit is a single real estate interest and single premises. According to Citation, The term "unit" in the definition of "Premises" in Section 3.12 of the ESA refers to the type of entity as the Salem Unit. In the *Freeman Coal* decision, the Commission stated, "Reduced to the most basic component, the critical issue in this case involves the question of whether the borehole is a new 'premises' under the Act or whether it is the same premises CIPS was designated to serve in ESA 187." (Cit IB at 36, citing Order, Docket 01-0675 at 44)

Citation states that the Supreme Court has declared that unitization of separate tracts for the purpose of sharing in the production of oil creates a single ownership of the entire unit by the owners of the several tracts making up the unit, subject to the terms of any oil and gas lease. (Cit IB at 36-37, citing *Ragsdale,* 40 Ill. 2d 68, 70-71 (1968)) Citation contends that the Salem Unit is a discernable real property interest recognized by law, *Jilek v. Chicago Wilmington & Franklin Coal Co*., 382 Ill. 241 (1943), and that Citation's oil and gas rights to the Salem Unit meet the definition of "premises" set out in the ESA. (Cit IB at 36-37)

B. Waiver and Related Arguments; Other Issues

In Section V of its initial brief, Citation argues, "TCEC has waived any claim to serve the gas plant and 7 compressors and TCEC is barred by latches and estoppel." (Cit IB at 38) Regarding "waiver," Citation states that waiver is the intentional relinquishment of a known right. (*Id.*, citing *Crum & Forster v. Resolution Trust Corp*., 156 Ill. 2d 384, 396 (1993))

Citation states that in *Illinois Valley Electric Cooperative v. Princeton*, 229 Ill. App. 3d 631 (1992) ("*Illinois Valley*") the Illinois Valley Electric Cooperative ("IVEC") had an unwritten policy of allowing the City to provide electric service if the City of Princeton had a primary line closer to the location where the service was to be taken. This policy was in practice from the earlier 1960's until the mid 1970's. According to Citation, IVEC subsequently claimed the right to serve a subdivision and a trailer park even though the City had a primary line closer to those locations, and the court held that IVEC waived any objection to the City's service to those properties by its long-standing conduct, and further that the subdivision and trailer park could be treated as a single unit and that neither were "new customers." (Cit IB at 38, citing *Illinois Valley* at 638-639)

In Citation's view, Tri-County has likewise waived any right it ever might have had to provide service to the gas plant and compressors under its transformer theory of new service because for decades Tri-County has allowed Citation and Texaco to install transformers to conduct electricity to oil well sites throughout the Salem Unit without any claim of the right to serve. (Cit IB at 38) Citation contends, "TCEC was aware of the numerous oil wells in the Salem Unit in its service area and at no time since 1968 has TCEC ever claimed the right to provide direct service to the Salem Oil Unit based on its transformer theory.…" (*Id.* at 38-39, citing Tr. 543, 759, 1701-1703)

In Section V.B, Citation addresses latches. Citation states that principles of laches are applied when a party's failure to timely assert a right has caused prejudice to the adverse party, and that the two fundamental elements of laches are lack of due diligence by the party asserting the claim and prejudice to the opposing party. (Cit IB at 39, citing *Tully v. State,* 143 Ill. 2d 425, 432 (1991) ("*Tully*"))

Citation asserts that in the present case, Tri-County exhibited a lack of due diligence, failing, for over 35 years, to assert any claim to serve the Salem Unit's transformers while Citation has continued to expand and invest in its distribution network without any objection from Tri-County. Citation argues, "Because TCEC has failed to timely assert its claims and Citation would be prejudiced by a loss of its investment in its distribution facilities, compressors, and gas plant, TCEC is barred by latches." (Cit IB at 39)

Section V.B of Citation's initial brief is titled, "Necessary Party-Estoppel." Citation claims Tri-County is seeking relief that affects Citation's rights, but did not name Citation as a party to the proceeding. According to Citation, since the time the Complaint in this case was filed, Tri-County "allowed" Citation to extend its distribution lines and to

construct the gas plant and seven compressors all without Tri-County naming Citation as a party to this proceeding, which estops Tri-County from asserting any right or entitlement in this case. (Cit IB at 40)

In Section II.C of its initial brief, Citation states that Jeff Lewis, who is an engineering manager for Citation, testified that for safety reasons, the supplier of electricity to the gas plant should be the same supplier that provides electricity to the wells. (Cit IB at 14, citing Am. Ex. 4 at 6)

In Section VI of its initial brief, Citation argues, "Citation is not bound by the unsigned terms of the membership agreement." (Cit IB at 41)

Citation states that Marcia Scott incorrectly testified that Citation is a "member" of Tri-County for service at the office. (Tri Ex. A at 5). Tri-County Exhibit A-4 is an application for Membership and Agreement for Purchase of Electric Service dated December 10, 1998. Tri-County Exhibit A-4 proclaims that "acceptance" of this application by the cooperative shall constitute a contract for electric service that will remain in force for one year following the initial billing period and thereafter until cancelled by either party upon one month's notice in writing.

740 ILCS 80/1 provides, "No action shall be brought, … upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Tri-County Exhibit A-4 also states that "acceptance" of the application shall constitute membership in the cooperative, and includes a location for the cooperative's signature but it is not signed. Typically, Tri-County does not sign its own applications (Tr. 563). Citation states that Ms. Scott could not identify the signature on Tri-County Exhibit A-4 but she knew it was not signed by anyone from Tri-County (Tr. 563) and she acknowledged that the exhibit requires acceptance by the cooperative (Tr. 619-620). Citation argues that the "agreement" in Tri-County Exhibit A-4 is for more than one year in length (one year following the initial billing period) and the failure of Tri-County to sign the agreement makes the agreement, and the purported membership, unenforceable as beyond the statute of frauds. (Cit IB at 41, citing 740 ILCS 80/1)

C. Point of Delivery

In Section IV of its "responsive brief" ("Cit 2B"), Citation states that Tri-County argues that the intention of the parties is best illustrated by the interpretation they have placed on the agreement themselves and that subsequent actions of the parties may be considered to determine their intent. (Cit 2B at 15, citing Tri IB at 36) According to Citation, this principle defeats the arguments of Tri-County's Amended Complaint. Citation asserts that the transformers at the gas plant and compressors comprise the same electric configuration that has existed in the Salem Unit at thousands of oil wells

since 1952 (Tr. 757, 766, 1601), and that hundreds of transformers were placed in service at these wells with Tri-County's knowledge (Tr. 543, 759, 1702-1703). Citation claims the meaning that the parties repeatedly placed on the SAA for decades is that a transformer is not a new point of delivery, and that Citation is the same customer of IP at the Texas substation that it has been since the SAA went into effect. Citation argues, "At no point from 1968 to 2005 did Tri-County claim that a transformer was a new point of delivery under the SAA (Tr. 543). These actions, not the discussions in 2005, reflect a long pattern of behavior and the true interpretation of the parties about the meaning of the SAA." (Cit 2B at 15-16)

In Section V of its responsive brief, Citation argues that the *Spoon River* case, 219 Ill.App.3d 291, cited by Tri-County, is inapplicable. (Cit 2B at 17) Citation states that Tri-County argues the Commission has previously refused to define a "point of delivery" as the place where the customer elects to connect its distribution system to the facilities of the electric supplier. Citation contends that *Spoon River* provides no support for Tri-County's position because Citation is not electing to make a "new connection" of its distribution system to an electric supplier. Citation asserts that Citation's distribution system connects at the Texas substation as it has since before the SAA. (Cit 2B at 17)

Citation argues, "Unlike *Spoon River*, the Texas substation and the connection of the Salem Unit to the Texas substation was in existence on the date the SAA went into effect. The instant case does not involve a situation where Citation is connecting its distribution system to an electric supplier." (*Id.*)

VIII. TRI-COUNTY RESPONSE TO AMEREN AND CITATION

A. Response to Ameren

1. Section 3(b) Grandfather Rights

In Tri-County's reply brief ("Tri 2B") to Ameren's initial brief, Section I of Tri-County's Argument is titled, "Section 3(b) does not trump Section 1 of the [SAA]." (Tri 2B at 9)

According to Tri-County, while Section 3(b) gives each of Tri-County and IP the right to continue serving "existing customers" and "existing points of delivery" located in the service area of the other party, Section 1(c) states that an "existing customer" becomes a "new customer" if the existing customer applies for electric service at a "point of delivery" that was not energized or did not exist on March 18, 1968. Further, Section 1(d) defines an "existing point of delivery" as an electric service connection in existence and energized on March 18, 1968. Neither the gas plant or the eight gas compressor sites or the electric service connections for each existed on March 18, 1968. (Tri 2B at 9)

Tri-County argues, "Thus, the delivery points created for the gas plant and the eight gas compressor sites are new 'points of delivery' because Section 1(c) commands

that an 'existing customer' becomes a 'new customer' if that customer establishes a 'point of delivery' which was not energized or in existence on March 18, 1968." Consequently, even though Section 3(b) allows Tri-County and Ameren to serve existing customers at points of delivery existing on March 18, 1968, Section 1(c) prevents both Tri-County and Ameren from serving new "points of delivery" created by existing customers in the other party's service territory. To that extent, Section 3(b) cannot properly be construed to trump Section 1. (*Id.* at 9-10)

Tri-County next states that Ameren further argues Section 3(b) grants the right to Ameren to continue to provide electric service to "existing customers" and also to "existing points of delivery" forever. (Tri 2B at 10) It appears to Tri-County that Ameren's argument is that even if an "existing customer" creates a new "point of delivery," Ameren may continue to serve that existing customer's new point of delivery of electric service located in Tri-County's service territory because Ameren has concluded that the SAA treats existing customers separate and distinct from existing points of delivery and/or new points of delivery. Tri-County responds, "However, Citation is not the same entity as Texaco and Citation was not an 'existing customer' of IP on March 18, 1968. Therefore, Section 3(b) cannot be construed to treat Citation as an 'existing customer' since Citation was not IP's customer on March 18, 1968 or July 3, 1968." (Tri 2B at 10)

According to Tri-County, to accept this argument ignores Section 1(c) of the SAA that makes an "existing customer" a "new customer" when that existing customer creates a "point of delivery" that was not energized on the effective date of the SAA. Thus, Tri-County asserts, Ameren's argument that the SAA creates two separate bases for Ameren's continued right to serve Citation's gas plant and seven of the eight gas compressor sites located in Tri-County's territory violates accepted contract construction principals which require the trier of fact to give meaning to all provisions of an agreement and all parts must be construed together to render them consistent with each other. (Tri 2B at 10-11, citing *Roubik v Merrill*, *Lynch, Piece, Fenner,* 285 Ill. App. 3d 217 (1997); *P.R.S. International v Shred Pax Corp*., 292 Ill. App. 3d 956, (1997))

In Section I.B of its Argument, Tri-County contends, "IP's argument that Section 3(b) of the [SAA] creates grandfathered rights is inconsistent with IP's previous interpretation of Section 3(b)." (Tri 2B at 11)

Tri-County states that Ameren argues that the phrase "existing point of delivery" means if an "existing customer" goes out of business or vacates the premises, the electric supplier retains the continuing right to re-establish service to a different customer at the place or "spot" where IP had an "existing point of delivery." According to Tri-County, Ameren argued the opposite proposition before the Commission regarding identical Section 3(b) language in the *MJM* case in Docket No. 93-0150. (Tri 2B at 11)

Tri-County states that in *MJM*, the Commission held that a service area agreement very similar to the SAA at issue in this docket does not create grandfathered

rights. In that docket, MJM contended it had grandfathered rights to serve property or "premises" occupied by a drive-in theater which MJM had served prior to the date of the SAA at issue in that docket. When the SAA was created between MJM and IP, the territorial boundary line split the drive-in theater property in half with part of the drive-in theater facilities on MJM's side of the boundary line and part of the facilities on IP's side of the boundary line with MJM serving the whole drive-in theater complex from a transformer and delivery point which pre-dated the IP/MJM agreement and which delivery point was located on MJM's side of the boundary line.

The drive-in theater went out of business and vacated the "premises." Later, a VFW building was constructed on the former drive-in theater property with the actual building and IP's new electric delivery point located on IP's side of the boundary line. MJM contended it was grandfathered by Section 3(b) of the service area agreement, the language of which is the same as in the SAA at issue in this docket, to serve the whole drive-in theater property from MJM's point of delivery that was then in existence and which had been in existence on MJM's side of the boundary line when the territory agreement was signed.

IP argued no grandfathered rights existed under the agreement and the Commission agreed, stating at page 12 of its order, "While a supplier's grandfather rights to serve certain 'premises' are addressed in Section 5 of the Act and in caselaw interpreting Section 5 and the definitions used therein, the parties' Agreement does not assign service rights based on a right to serve 'premises', but instead bases such rights on terms like 'existing point of delivery.'" The Order continued, "As argued by IP, and made clear by the courts, it is the provisions of the Agreement, once approved, and not the provisions of the Act, which are controlling." The Order added, "As explained by the Illinois Supreme Court in *Rural Electric*, 'These two sections (Sections 2 and 6 of the ESA) make clear that once properly approved by the Commission, such ... agreements control the right of the parties … to the exclusion of the Act, except insofar as the agreement incorporates the Act.'" (Tri 2B at 11-12)

In Tri-County's view, Ameren's argument in this docket that the same Section 3(b) provision of the SAA assigns service rights on the basis of grandfathered rights or "premises" is inconsistent with IP's argument in the *MJM* docket. Tri-County states that Ameren attempts to bar Tri-County's right to serve new service connection points or "delivery points" created in Tri-County's service area by Citation, by claiming the SAA grandfathers Ameren to serve all of Citation's points of delivery. Tri-County argues that Ameren cannot base its claim in this docket on an argument which is inconsistent with its earlier successful argument in the *MJM* docket. (Tri 2B at 12-13, citing *Giannini v. First National Bank of Des Plaines,* 136 Ill. App. 3d 971; 91 Ill. Dec. 438, 449 (1985))

Ameren further argues that the definition of "customer" as used in the ESA means a person receiving electricity from an electric supplier and since the Salem Oil Field was receiving electricity from IP in 1968 and since laws in existence at the time of the contract are considered part of the contract, the Salem Oil Field was IP's existing customer in 1968. Tri-County responds, "However, there is no evidence in the record

the Salem Oil Field is a "person" as defined by Section 30/3.11 … and cannot arguably be a 'customer' as defined in Section 30/3.3…." (Tri 2B at 13) Tri-County further asserts that Ameren's argument fails to recognize the *MJM* decision. Thus, Tri-County argues, Ameren cannot now claim the right to serve either the Salem Oil Field as a unit or as a single premises or to be grandfathered to a "new delivery point" to serve Citation, which is "particularly true" since Citation is not the same customer as Texaco which IP was serving on March 18, 1968. (Tri 2B at 13)

2. Whether Citation Constructed New Points of Delivery for each of the Gas Plant and Compressor Sites

Section II of Tri-County's Argument is titled, "Citation actually created, constructed and is using new points of delivery for each of the gas plant and the gas compressor sites located in Tri-County's service territory." In Section II.A, Tri-County argues, "IP's claim that Citation never requested electric service for the gas plant and gas compressor sites is a ruse to allow IP to circumvent the [SAA]." (Tri 2B at 13)

Michael Tatlock, Ameren's electric engineer charged with the responsibility of dealing with the service territory issues under the SAA, considered the contacts by Finch of Citation with Ameren as requests for electric service at a new point of delivery to be located adjacent to the gas plant. Marcia Scott, the General Manager of Tri-County, considered the request by Finch and Gardner, both of Citation, with Tri-County's Dennis Ivers and Bradley Grubb as requests for electric service for the gas plant. (Tri 2B at 14, citing Tr. 498, 1224-1228; Tri Ex. A at 6)

According to Tri-County, to argue that Citation never made an application for electric service but simply utilized its own electric distribution line to bring electric service to the new delivery points constructed for the gas plant and the gas compressor sites ignores the issue in this docket. The only questions to be decided are "(1) do each of the step down transformers and associated apparatus at the gas plant and gas compressor sites constitute delivery points and (2) were they created after March 18, 1968." (Tri 2B at 15-16)

In Tri-County's view, "To accept IP's argument that Citation never applied for electric service at the new service connection points for the gas plant and the gas compressor sites would simply allow customers to circumvent the valid Commission approved [SAA] delineating service rights between Tri-County and IP." (Tri 2B at 17)

In Section II.B of its Argument, Tri-County responds to Ameren's claim in its initial brief that Tri-County's interpretation of Section 1(c), that an "existing customer" such as Citation becomes a "new customer" when Citation creates a delivery point that did not exist on March 18, 1968, divests Ameren of its grandfathered service rights under the SAA. Tri-County argues that the SAA at issue in this docket "does not create grandfathered rights for either Tri-County or IP…." (Tri 2B at 17-18, citing *MJM* Order in Docket 93-0150) Tri-County adds, "If grandfathered rights do not exist, they cannot be forfeited." (Tri 2B at 17-18)

In Section II.C of its Argument, Tri-County argues, "The [SAA] does not determine service rights on the basis of 'premises' or units.'" (Tri 2B at 18) Tri-County states that Ameren argues in its initial brief at pages 18-21 that the Salem Oil Field is a single unit or a premise and as such should be treated as one customer which can establish its own electric distribution system to power all of the electrical equipment located within the Salem Oil Field unfettered by the territorial boundary lines established by the SAA. In support of this claim, Ameren refers to testimony of Herr, Ameren's witness, that over 245 contiguous oil and gas leases were combined when the Salem Oil Field was unitized. According to Tri-County, this is not an accurate statement of Herr's testimony on this point. Rather, Herr testified that prior to unitization, there were 245 separate leases involved in the Salem Oil Field. (Tri 2B at 18, citing Am Ex. 8 at 4-5)

Ameren also premises this argument on the legal effect of unitization of separate oil leases citing *Ragsdale,* 40 Ill. 2d 68 (1968) and on the definition of "premises" in Section 3.12 of the ESA. Tri-County responds that the word "premise" does not appear in the SAA at issue in this docket and *Ragsdale* held that all the separate oil lease owners had to be parties to the litigation because the field had been unitized. Tri-County states that Ameren made no attempt to add all the separate oil lease owners in the Salem Oil Field as parties to this docket leading to the conclusion the *Ragsdale* decision is not relevant to this docket. Tri-County further contends that Ameren's argument ignores the testimony of its witness Herr that unitization of the Salem Field has no relationship to the electric distribution system for the oil field which can be served by multiple suppliers even though it is unitized. (Tri 2B at 18-19, citing Tr. 1777-1778)

Most importantly, Tri-County argues, service rights delineated in the SAA are not delineated on the basis of premises or units. Rather, electric service rights of Tri-County and Ameren are based upon the location of points of delivery of electric service for a particular customer and where the physical location of that point of delivery is located in relationship to the territorial boundary line established by the SAA and not the unitization of the oil field or the oil field as a single premise. (Tri 2B at 19, citing Docket 93-0150, Order at 11-13) Tri-County argues, "To accept IP's argument that the Salem Oil Field is a single premise to which IP was providing electric service for the whole of the Salem Oil Field on the date of the [SAA] and thus, should be entitled to continue to provide electric service to the whole of the oil field thereafter despite the establishment of new delivery points within the oil field or a change in the customer is contrary to the intent of the [SAA] at issue in this docket." (Tri 2B at 19)

Tri-County argues that the Commission, "when interpreting the [SAA] at issue in this docket, has never accepted the argument presented by Ameren that the Salem Oil Field as a single premise controls the outcome of this case. Tri-County states that in the *Unimin* decision in Docket 88-0276, the Commission refused to let IP serve the new delivery points created by Unimin for the new Unimin strip mines located in Illinois Valley's service territory by means of Unimin's electric service distribution line connected to IP's transmission line in IP's territory. (Tri 2B at 19-20)

Tri-County states that Ameren cites *Central Illinois Public Service Company vs Wayne-White Counties Electric Cooperative*, ICC Docket 92-0463, for the proposition that new wells drilled in a unitized operation do not create new customers.

According to Tri-County, the order in that docket was interpreting an entirely different service area agreement than the one in this docket. The Agreement between Wayne-White and CIPS granted electric service rights to each of Wayne-White and CIPS by virtue of physical premises delineated by physical boundaries and specifically granted certain grandfathered service rights. In Docket No. 92-0463, Superior Oil Company ("Superior") decided to disconnect CIPS electric service from oil wells that had been served by CIPS or its predecessors since prior to July 2, 1965 and prior to the service area agreement of July 3, 1968 and a second agreement of March 12, 1975. Under the agreements, CIPS was grandfathered to serve customers at locations which it was serving on July 2, 1965 even though the location was located in Wayne-White's service area designated under the agreement. Superior disconnected wells located in CIPS' grandfathered location from CIPS' electric service and connected the wells to Wayne-White's service. The Commission determined the agreement grandfathered each party to continue to furnish service to customers at locations which it served on July 2, 1965 and that Superior as the customer could not disconnect CIPS' electric service from wells situated in CIPS' grandfathered location and connect the wells to Wayne-White's service. (Tri 2B at 20)

Tri-County argues that the Order in Docket 92-0463 is based on an agreement that specifically provided for grandfather rights at customer locations or premises situated in specifically designated service territories, while the Tri-County/IP SAA does not. (Tri 2B at 21)

3. Point of Delivery; "Modifications" under Section 1(d)

In Section III.A, Tri-County takes issue with Ameren's argument that Tri-County must "concede" that the point where Citation's system connects to the Texas Substation constitutes "an electric service connection which is in existence and energized on [July 3, 1968]" in order to attempt to prove that "modification[s] of such electric service connection … by which an additional phase or phases of electric current are added to the connection" have occurred. According to Tri-County, it is Ameren, not Tri-County, who raised the argument that Ameren's Texas Substation is the point of delivery and/or service connection point for the gas plant and the gas compressor sites located in Tri-County's service territory. (Tri 2B at 22)

In response to the argument by Ameren, Tri-County's witness Dew testified that if the Texas Substation is the delivery point of electric service for the Salem Oil Field, which Tri-County disputes, then Ameren has made numerous modifications to that substation which have increased its capacity to provide electric service to not only the Salem Oil Field, but to the other customers served by Ameren from the Texas Substation. (Tri 2B at 23, citing Tri Ex. D at 7-13)

Dew stated that substations are the heart of the electric supplier's distribution system with electric power delivered from the generating station at 34.5 kV or 69 kV to the substation where transformers reduce the voltage to 12.47 kV for distribution across 12.47 kV distribution lines to transformers at electric facilities of customers where transformers again reduce the distribution line voltage to a voltage usable by the customers' motors. He testified that virtually all electric motors are either small motors utilizing single phase or larger motors utilizing three phase and because all of those motors are served by the same substation, all substations are built to handle three phases of electric current in order to furnish adequate electric service to all the customers of the electric supplier receiving service from that substation. Tri-County argues that if, as Ameren claims, the Texas Substation is the "delivery point" and if, as Ameren claims, the Agreement only allows a delivery point to be modified by a change in the phase of electricity at the delivery point, then the Texas Substation could never be modified in terms of the delivery point, but yet capacity could be increased at the Texas Substation to allow Ameren to serve with impunity additional customers with electric facilities in Tri-County's service territory in violation of Section 3(a) of the SAA. (Tri 2B at 23, citing Tri Ex. F at 3-5, Tr. 745)

Tri-County states that neither Tatlock nor Malmedal, who testified for Ameren, contradicted Dew's opinion that the modifications made by Ameren to the Texas Substation allowed Ameren to increase capacity at the Texas Substation and provide additional electric service to IP's customers including Citation. IP's outside electrical engineer Keith Malmedal agreed that Citation could disconnect its 12.47 kV distribution line from the Ameren Texas Substation and reconnect it to the Tri-County Salem Substation taking electricity from Tri-County to power the Citation gas plant, gas compressors and all of the Salem Oil Field or any other additional electrical load that Citation chose to serve with its own 12.47 kV distribution line. (Tri 2B at 24, citing Tr. 1951-1952)

Tri-County states that Malmedal agreed the Ameren Texas Substation was built as a three-phase substation and that it was not customary to build substations with less than three phases. He also agreed that adding Citation's gas plant to the electric circuit taking electricity from the Texas Substation actually increased the electric load of the substation. Because all electric substations used by electric suppliers are built as three-phase substations and because in the current docket Citation could easily disconnect its 12.47 kV distribution line from the Ameren Texas Substation and reconnect it to Tri-County's Salem Substation nearby, it was Dew's engineering opinion that the parties did not intend for substations used by Tri-County and Ameren to be considered a "delivery point" for purposes of the SAA. (Tri 2B at 24-25, citing Tri Ex. F at 5-8, Tr. 1934-1940)

In Section III.C of its reply brief, Tri-County asserts that Dew's engineering opinion differed from Ameren's claim because those modifications allowed Ameren to serve increased electrical needs of both Citation and other customers served by that substation in the same manner as increasing the phases of electricity would at the "point of delivery" located on the customer's site where the electricity is actually utilized

by electric motors of the customer. Thus, there is an engineering dispute regarding the proper interpretation of Section 1(d) if in fact it is determined, contrary to Tri-County's position, that the Texas Substation is a "delivery point" for purposes of the Salem Oil Field. (Tri 2B at 25-26)

Tri-County takes issue with Ameren's assertion that "TCEC's contention that adding capacity to the Texas Substation forfeits Ameren's right to continue serving its existing customers would effectively bar Ameren from improving a facility that serves many customers other than Citation." (Am IB at 25) According to Tri-County, "The logical answer to Ameren's argument is that substations are not intended to be delivery points under the [SAA.]" (Tri 2B at 26)

Tri-County next states that Ameren implies Tri-County is claiming the right to serve all of the Salem Oil Field electric facilities in Tri-County's service area. According to Tri-County, "That is not the claim in this docket." Tri-County asserts that in the first place, Tri-County is not claiming IP's Texas Substation is a "point of delivery." Secondly, Tri-County "claims only the right to serve the gas plant and seven of the eight gas compressor sites located in Tri-County's service territory based upon the establishment of the new 'delivery points' by Citation at the sites of each of those facilities for purposes of delivering electricity at a usable voltage to those facilities." (Tri 2B at 26-27)

In a footnote on page 22 of its initial brief, Ameren states that because Tri-County admits Ameren upgraded components of the Texas Substation on numerous occasions since 1969, Tri-County is presumptively guilty of laches for failure to assert its claim sooner.

In response, Tri-County asserts that if this is intended as an argument to support Ameren's claims, then Ameren is barred from raising it, as laches is an affirmative defense that must be specifically pled in Ameren's answer which Ameren did not do. (Tri 2B at 25, citing 735 ILCS 5/2-613(d); 83 Ill. Adm. Code 200/180(b)) Tri-County adds, "As noted earlier, Tri-County's argument that the Texas Substation has been modified many times was raised in direct response to IP's claim raised for the first time in IP's testimony that the Texas Substation constituted a delivery point under the Agreement." (Tri 2B at 25)

In Section III.D of its reply brief, Tri-County states that Ameren appears to claim for the first time in its initial brief, on page 23, that the Ameren Texas Substation is not the "delivery point" for the Salem Oil Field. Instead, Ameren argues that the actual "point of delivery" is the point where the Citation electrical conductors forming the 12.47 kV distribution line connect to the Ameren Texas Substation and that any modification to the Ameren Texas Substation would be irrelevant to the issue in this docket because those modifications occurred "behind" the actual "point of delivery" and within the substation structure. In Tri-County's view, this argument fails to consider all of the relevant language in Section 1(c) and (d) as well as in Section 3 regarding use of

the phrase "point of delivery" and "electric service connection." Tri-County submits that the two are not used together in every instance in Sections 1 and 3. (Tri 2B at 28)

Tri-County states that Ameren implies the transformation of the electric voltage from the voltage generated at the electric generation station to a voltage usable by the customer's electric motors is either unimportant or unnecessary to the meaning of "point of delivery" as used in the Agreement. According to Tri-County, such reasoning is not supported by the engineering testimony in this docket. In the first place, Ameren's electricity enters the high side of the transformers located in the IP Texas Substation at 69 kV. Voltage is reduced by transformers located within the Ameren Texas Substation to 12.47 kV which is then passed to the Citation conductors comprising the Citation distribution line at 12.47 kV. That connection takes place at the low side of Ameren's Texas Substation transformers. Consequently, there is a transformation or reduction in the voltage at the Texas Substation before the electricity is passed on to the Citation distribution facilities. Tri-County states that the Citation distribution facilities carry the 12.47 kV several miles to another "point of delivery" downstream from the substation where another transformer is located reducing the 12.47 kV to a voltage of 277/488 and passed by a conductor from the low side of that transformer into the gas plant and the gas compressor sites for operation of the Citation electric motors at those locations. (Tri 2B at 28-29)

4. Defining "Delivery Point" according to its Plain Meaning

In Section III.E of its reply brief, Tri-County states that Ameren argues that the common ordinary dictionary meaning of "connection", "delivery", "point", and "service" should be utilized in interpreting "point of delivery" and "electric service connection" as used in the Tri-County/IP SAA. (Tri 2B at 29-30, citing Am IB at 23-26)

According to Tri-County, "No evidence appears in this record that the parties intended the use of the common dictionary meanings for the words in question. That is a new argument raised for the first time in Ameren's Initial Brief and not supported by any of the evidence." (Tri 2B at 31) As noted by Tri-County witness Dew, those phrases when used in conjunction with each other have a common meaning within the electric supplier industry. Ameren's Tatlock relied upon that common understanding within the electric supplier industry when he testified that it was his understanding Citation was asking for a new "point of delivery" for the gas plant when Citation's Clyde Finch contacted him regarding construction of electric facilities for service to the Citation gas plant. Ameren's Siudyla testified to the same effect regarding the use of the phrase "point of delivery" within the electric supplier industry. Ameren witness Malmedal concurred with the commonly understood use of "point of delivery" within the electric supplier industry when he testified that if Ameren owned the 12.47 kV distribution line bringing electricity to the transformers which reduced that voltage to a usable voltage for each of the gas plant and gas compressor sites, the "electric service point" would be at the low side of the transformer at that location and the "delivery point" would be at the meter and would in this case be located in Tri-County's service territory. (Tri 2B at 30-31, Tr. 1886-1887, 1892, 1907-1908)

Section III.F of Tri-County's Argument is titled, "Point of delivery is not defined in the Tri-County/IP [SAA]." (Tri 2B at 31) Tri-County takes issue with Ameren's argument that Tri-County witness Dew's opinion testimony as to what the phrase "point of delivery" means in the electric utility industry has no relevance. (Am IB at 25-26)

According to Tri-County, Ameren's argument begs the question because "point of delivery" is not defined in the Agreement and neither is "electric service connection." Thus, Tri-County argues, the Commission has to turn to outside evidence to establish the meaning of those phrases. The only testimony in this record regarding the meaning of those phrases is that which has been supplied by Tri-County's engineer Dew, Ameren's engineers Tatlock, Siudyla and Malmedal, and Tri-County's Marcia Scott. Additionally, if the Commission must look to other outside references besides the testimony in this docket to arrive at the meaning of the phrase "point of delivery" or "electric service connection," the ESA has fact defined "normal service connection point" to mean "…that point on a customer's premises where an electric connection to serve such premises would be made in accordance with accepted engineering practices. …" (Tri 2B at 32, citing 220 ILCS 30/3.10) In applying that statutory definition, the Commission has determined that the "normal service connection point" is deemed to be the location of the transformers used to reduce the voltage to a level usable by the consumer. (Tri 2B brief at 31-32, citing *Jo-Carroll,* Dockets 93-0450 and 93-0030, Cons. on Remand (October 9, 1996))

In Tri-County's view, this definition comports with Dew's testimony that "point of delivery" as utilized in the electric supplier industry is the point where the step-down transformer is located in close proximity to the customer's place of usage of the electricity. (Tri 2B at 32, citing Tri Ex. D at 5-6; Tr. 745) Tri-County states that Ameren's Siudyla agreed the step-down transformer at the gas plant would constitute a "new point of delivery" in Tri-County's territory and Ameren could not extend it distribution line to the gas plant to provide electric service. (*Id.* citing Tr. 1346-1351, 1375-1377) Tri-County argues that even if the dictionary definition for each of the words "connection," "delivery," "point," or "service" were utilized, it would not change the generally understood usage of "point of delivery" within the electric supplier industry as utilized in the SAA. (Tri 2B at 32-33)

Tri-County takes issue with an argument by Ameren that the use of the phrase "as used herein" means that the parties intended to exclude the extrinsic evidence to interpret the phrase "point of delivery." According to Tri-County, the Commission and the courts have directed that where a phrase such as "point of delivery" is not defined within the Agreement, it is appropriate for the Commission to utilize extrinsic evidence to determine the meaning of such a phrase. Tri-County argues, "That is exactly what the parties did in this case." Tri-County further observes that Ameren also introduced extrinsic evidence in this proceeding as to the meaning of "point of delivery." (Tri 2B at 33)

5. Whether Citation is a "New Customer" under the SAA with respect to Gas Plant and Compressors Sites in Tri-County's Territory

In Section IV of Tri-County's Argument in its reply to Ameren's initial brief, Tri-County argues, "As to the gas plant and gas compressor sites in Tri-County's territory, Citation is a 'new customer' under the Tri-County/IP [SAA]." (Tri 2B at 33) In Section IV.A, Tri-County argues, "Tri-County's evidence clearly shows Citation created new delivery points for the electricity used at Citation's new gas plant and gas compressor sites." (*Id*.)

Tri-County states that on page 27 of its initial brief, Ameren claims Tri-County never links its point of delivery argument to a particular section of the SAA, and Ameren reasons that if each point of delivery is the location where the electricity is reduced to a voltage usable by the customer's facilities, then hundreds of new customers are created within the Salem Oil Field. Tri-County responds that the SAA controls whether a new customer is created when an existing customer creates a new point of delivery, and that Tri-County references Section 1, paragraph (c) and Section 3(a) of the SAA in its Complaint. Tri-County asserts that its interpretation of the Agreement that Citation as an "existing customer" of Ameren becomes a "new customer" under Section 1(c) by reason of creating new delivery points for the gas plant and gas compressors is uniformly applicable to both Tri-County and Ameren and avoids manipulation of the agreement by a customer. (Tri 2B at 34-35)

According to Tri-County, while Section 1(b) defines "existing customer" as one receiving electric service on the date of the SAA, Section 1(c) defines "new customer" as a "…person, corporation or entity including an existing customer who applies for … electric service at a 'point of delivery' which is not energized on the effective date of this Agreement." Tri-County argues, "If, as IP argues, all it has to do is establish that the Salem Oil Field is an 'existing customer' served by IP on March 18, 1968 in order for IP to continue to serve all of the electrical facilities established by Citation subsequent to March 18, 1968, then there would be no need for Section 1(c) to include the phrase 'including an existing customer' when defining a 'new customer.'" (*Id.* at 35)

Tri-County contends that the SAA allows for an "existing customer" such Citation to become a "new customer" when a "point of delivery" for electric service is established that did not otherwise exist on March 18, 1968. Tri-County argues, "That is exactly what has happened in this docket with respect to the Citation gas plant and the Citation gas compressor sites." If the definition of the "point of delivery" is as defined by Dew, Siudyla and Tatlock, then each of the gas plant and the seven gas compressor sites located in Tri-County's service territory are "new points of delivery" and under Section 1(c) Citation as an "existing customer" becomes a "new customer" with respect to those delivery points. Tri-County argues that since those "new delivery points" are located in Tri-County's service territory, Section 3(a) prohibits Ameren from providing electric service to them. (Tri 2B at 35-36)

In Section IV.B of its Argument, Tri-County argues, "Citation cannot utilize the 12.47 kV of electricity received from IP at the Texas substation to operate the gas plant and gas compressor sites." (Tri 2B at 36)

Tri-County states, "IP contends that Tri-County's argument that each of the step-down transformers and other devices comprising the connection of the gas plant facilities and gas compressor site facilities to the Citation 12.47 kV distribution line … if literally applied would by implication create separate delivery points at the connection point of the Citation 12.47 kV distribution line with the IP Texas Substation." (Tri 2B at 36, citing Am IB at 28) Ameren claims that at that location, there are transformers that reduce the 12.47 kV voltage to a voltage usable by electric motors and metering devices. According to Tri-County, those "delivery points" were created before the SAA and are not at issue in this docket since Tri-County has made no claim to provide electric service to the same. Tri-County also asserts that Ameren's electrical engineer Malmedal testified Citation could not reduce the 12.47 kV of electricity received from Ameren at the Texas Substation to a level of 277/480 volts and transmit that voltage level across its distribution line and expect to have sufficient voltage to operate the electric motors at the gas plant and gas compressor sites without using tremendously large conductors and support structures, all of which would be very expensive. (Tri 2B at 36, citing Tr.1863-1869)

Tri-County states that Ameren further claims a large industrial customer can purchase high voltage energy and use its own distribution system to move the energy anywhere on its premises. Tri-County responds, "This argument assumes that 'premises' and grandfathered rights to those premises are part of the equation in determining whether a 'point of delivery' is served by Tri-County or IP. That simply does not conform to the [SAA] at issue in this docket nor with the Commission's [Order in Docket 93-0150], that the parties' [SAA] simply does not assign service rights based on a right to serve grandfathered 'premises.'" (Tri 2B at 36-37) Tri-County argues, "Therefore, the fact that Citation utilizes its own distribution facilities to move the voltage received from IP at the Texas Substation to different locations for further reduction of the voltage and use at those separate locations does not allow IP to automatically provide electric service to those separate electric facilities of Citation unless those facilities are in IP's service territory which they are not in this docket." (2B at 36-37)

Section IV.C of the Argument in Tri-County's reply brief is titled, "IP cannot identify any provision of the [SAA] that incorporates IP's Texaco or Citation electric service contracts or IP's tariff." (Tri 2B at 37)

Ameren argues on page 29 of its initial brief that "point of delivery" is contractually defined in IP's Electric Service Contract with Texaco as the point where Ameren's 69 kV lines connect to the Ameren Texas Substation. Ameren further argues that IP's applicable tariff defines "point of delivery" as the IP Texas Substation. Tri-County responds, "However, the evidence in this docket shows that the IP/Texaco and Citation Electric Service Agreements and the IP tariffs are not agreements to which Tri-County is a party." (Tri 2B at 37) Tri-County argues that there is no evidence in this

docket that Tri-County was ever aware of these agreements between IP and Texaco or of IP's tariffs, and that the authorities cited by Ameren are not applicable to Tri-County.

Tri-County states that is not a subscriber of Ameren nor is Tri-County deemed by implication to have knowledge of IP's tariffs, and Ameren never introduced any evidence in this docket to reflect that IP gave notice to Tri-County of its contracts for electric service or its tariffs regarding the definition of "point of delivery" when the SAA was negotiated and signed. Tri-County argues, "For IP to now claim that these separate agreements constitute a part of the [SAA] is a grossly unfair interpretation of the [SAA] and violates the covenant of good faith and fair dealing that is implicitly a part of the [SAA]…." (Tri 2B at 37-38)

In Section IV.D of its Argument, Tri-County responds to Ameren's reliance on the "*Old Ben*" decision in Docket 89-0420 which is a Commission decision allowing CIPS to extend electric service underground by use of Old Ben Mine No. 24 electrical facilities to a mine hole located in Southeastern's service territory under the SAA. Tri-County states that the service area agreement at issue in that case incorporated by reference the grandfathering provisions of Section 5 of the ESA and therefore grandfathered CIPS to continue to serve electrical customers with which it had a binding electric service contract in existence on the date the agreement was entered into.

Tri-County states that CIPS claimed it did have such an agreement in existence and was therefore grandfathered to follow the electric service of Old Ben Mine into Southeastern's service territory, and the Commission agreed. In Tri-County's view, the *Old Ben* case is not applicable to this docket because Ameren cannot point to any similar grandfathering provision in the SAA at issue in this docket nor can Ameren point to any provision of the SAA that incorporates the grandfathering provisions of Section 5 of the ESA. (Tri 2B at 39)

6. Further Responses to Ameren

In Section I of its reply to Ameren's response brief, Tri-County argues, "IP"s actions in this case have created the ambiguity in the [SAA] regarding the meaning of 'point of delivery.'" (Tri 3B at 5)

According to Tri-County, until July 14, 2005 Tri-County and IP uniformly applied the phrase "point of delivery" for electric service as used in Section 1(c) and (d) as the connection between the distribution line and the customer's voltage reduction transformer reducing the distribution line voltage to a voltage usable by the customer's facilities. Tri-County claims it was not until Citation decided it wanted IP's electric service did IP's definition of "point of delivery" for electric service as used in Section 1(c) and (d) of the Agreement change to mean where ownership of the electricity is handed off to the customer. That action by IP created the ambiguity regarding the phrase "point of delivery." (Tri 3B at 8)

In Section I.B, Tri-County argues, “IP does not explain what the commonly understood meaning is of ‘point of delivery’ and ‘electric service connection’ as used in Sections 1(c) and (d) of the Agreement.” (Tri 3B at 9)

In Section I.C, Tri-County argues that Ameren incorrectly claims that "delivery," "service," and "connection" are used in the Agreement in accordance with their common ordinary meaning. (Tri 3B at 9) Tri-County argues that none of the electrical engineers, Dew, Tatlock, Siudyla and Malmedal, testified regarding their understanding of each of those single words but rather testified as to the phrases "point of delivery" and "electric service connection." "Point of delivery" and "electric service connection" are words of art within the electric utility industry with a more extensive meaning than the commonly understood separate meanings of "deliver" or "point" or "connection." (Tri 3B at 9-10)

In Section I.D, Tri-County argues that IP created the dispute regarding the meaning of "point of delivery" by changing the definition of the phrases. (Tri 3B at 10)

In Section I.E, Tri-County takes issue with Ameren’s argument that “if a 1968 ‘existing customer’ with unitary facilities simultaneously operating in both service areas morphs into a ‘new customer’ every time it unilaterally extends conductors to a new motor (or security light or recloser station), §3(b) grandfather rights would evaporate.” (Am 2B at 7)

Tri-County responds, in part, that Sections I(c) and (d) and 3(b) of the Agreement must be construed together. According to Tri-County, when this is done, it is clear that an existing customer such as Citation, which happens to be an existing customer of both Tri-County and Ameren, will be considered a "new customer" if a "point of delivery" for electric service that did not exist on the effective date of the Agreement is created by the existing customer. Tri-County argues, “All other ‘points of delivery’ of the ‘existing customer’ that were in existence on the effective date of the Agreement remain either Tri-County's or Ameren's to serve. That is all Section 3(b) does.” (Tri 3B at 11)

In Section I.F, in response to Section III.A.5 of Ameren’s response brief (“Am 2B”), Tri-County takes issue with the assertion by Ameren that the undisputed evidence establishes that Ameren's Texas Substation transforms 69 kV electricity to 12.47 kV, which is a “level usable by the customer.” (Am 2B at 12) According to Tri-County, both consulting electrical engineers, Dew and Malmedal, testified that none of the gas plant electric facilities and gas compressor facilities could utilize a voltage at the level of 12.47 kV and if it were tried, the voltage would destroy the motors. The voltage had to be reduced to 277/480 volts by a step-down transformer located adjacent to the gas plant and each of the gas compressor sites. (Tri 3B at 13, citing Tr. 987-989, 1839-1848, 1863-1869)

In Section I.G, Tri-County responds to an argument by Ameren that Tri-County’s “practical construction” argument “actually boomerangs in favor of Ameren because TCEC stood by for over 37 years while Texaco and Citation repeatedly extended the

distribution system to new pumps for some 98 new wells and two central pumping stations, all in TCEC's service area." (Tri 3B at 13, citing Am 2B at 11)

Tri-County characterizes Ameren's "practical construction" argument as an untimely "waiver argument" that was "only briefly mentioned" in a footnote on page 22 of Ameren's initial brief, in the form of a "laches" claim for which no argument was presented. (Tri 3B at 13)

Tri-County states that hardly any evidence appears in the record regarding laches or waiver most likely because Ameren did not properly plead the issue and allow discovery regarding the same or file testimony on the issue. Tri-County also states that Tri-County witness Ivers testified that Tri-County was not aware of any new wells. (Tri 3B at 14-15, citing Tr. 666) Tri-County further states that Ameren refers to no evidence in the record that either Citation or IP told Tri-County when new oil wells were established in the Salem Oil Field or that Tri-County had knowledge of the new oil wells at the time they were drilled.

In Section I.H, Tri-County takes issue with Ameren's assertion that Tri-County's interpretation would mean that the parties intended to bar the Salem Unit from extending its existing distribution system to reach every new well or pumping station sited in Tri-County territory after 1968 and force the unit operator to purchase Tri-County electric service. Tri-County also disagrees with Ameren's argument that other circumstances surrounding the execution of the contract make it unreasonable to infer that Ameren had any intent to interpret "point of delivery" any differently than as stated in its contemporaneous tariffs and electric service agreements. (Am 2B at 12-13)

According to Tri-County, Ameren's position is not supported. Tri-County notes that no witness who was involved in negotiating the SAA testified in this docket. Tri-County also asserts that Ameren's claim the Commission must apply the definition of "point of delivery" found in IP's electric service contracts and tariffs is inconsistent with Ameren's position that "point of delivery" and "electric service connection" are unambiguous terms and the Commission cannot seek the aid of any extrinsic evidence in defining the same. Tri-County, argues, "Certainly, IP's tariffs and electric service contracts with Texaco and Citation are extrinsic evidence." Tri-County further argues that Ameren's tariffs are limited by the terms of the tariff to Ameren's customers. (Tri 3B at 16)

In Section III of its brief, Tri-County replies to arguments in Section III.C of Ameren's response brief regarding the decisions in *Southwestern*, 202 III. App. 3d 567 (1990), and *Wayne-White*, 223 III. App. 2d 718 (1992).

Ameren attempts to distinguish the opinions in those cases from this docket because they involved a different type of service area agreement regarding grandfather rights. According to Tri-County, "However the principal announced in *Southwestern* and *Wayne-White* is that the customer cannot use its own distribution line to circumvent the

[agreement]. That principal applies to all [service area agreements] regardless of the methodology used in the agreement to assign service rights." (Tri 3B at 18-19)

Tri-County states that in Section III.C of Ameren's response brief, Ameren attempts to distinguish the Commission decision in the *Unimin* case in Docket 88-0276, by claiming Unimin utilized two electric suppliers for its silica sand mine and it did not involve the extension of the Unimin's customer distribution line to serve the new sand pits opened in Illinois Valley's territory. Unimin's private distribution line did extend across the IP/Illinois Valley territory boundary, but Unimin decided to have Illinois Valley extend a new line to serve the new mine pit in Illinois Valley's territory rather than extend its own distribution line connected to IP's substation on IP's side of the territory line. (Tri 3B at 19)

Tri-County states that IP opposed this arrangement and lost. According to Tri-County, the only difference between the *Unimin* case and this docket is the customer chose to abide by the agreement and have Illinois Valley construct the electric facilities for the new mine in Illinois Valley's territory rather than building its own line to bring IP electricity to the new mine. In the instant docket, Tri-County argues that Citation chose to build its own distribution line to the gas plant "to bring IP electric service" to the gas plant effectively circumventing the SAA at issue in this docket. (Tri 3B at 19-20)

In Section IV, Tri-County replies to arguments by Ameren in Section III.D of Ameren's response brief. According to Tri-County, whether Ameren has a right to serve a "delivery point" in Tri-County's service territory depends on whether the "delivery point" existed on the date of the SAA or is newly created. Tri-County argues "that is the issue in this docket" and Ameren can point to no language in the Agreement that declares Tri-County relinquished its right to serve these new "delivery points" in its service territory when it signed the Agreement. Tri-County adds, "There is no mention in the Agreement regarding the Salem Oil Field and there is no exception in the Agreement regarding the Salem Oil Field allowing Ameren to ignore the distinction between an "existing point of delivery" and a new point of delivery. (Tri 3B at 20)

B. Response to Citation

1. Point of Delivery

In Section III.A of its reply brief to Citation's initial brief, Tri-County asserts, in response to Citation's reliance on the definition of "point of delivery" in 83 Ill. Adm. Code 410.10 (Citation IB at 22), that electric cooperatives, such as Tri-County, are excluded from the provisions of Section 410.10 by Section 410.20. Tri-County states that Citation's argument ignores the fact that a Commission decision in this docket assigning service rights directly affects Tri-County's operations. In Tri-County's view, "Because Section 410.20 excludes Tri-County, as an electric cooperative, from the application of Part 410 of the Administrative Rules including Section 410.10, the Commission has no authority to apply the definition of 'point of delivery' found in Section 410.10 to the phrase 'point of delivery' as used in the [SAA]." (Tri 2B at 27)

In Section III.B, Tri-County takes issue with Citation's statement at page 25 of its initial brief that between 1968 and 2005 Tri-County never supplied electricity to the Salem Unit or any oil wells. Tri-County states that Scott was asked on cross examination if there had in the past been discussions about who would have the right to serve newly drilled oil wells, and she responded, "No, I assume there was no question. We have a territorial agreement." (Tri 2B at 29, citing Tr. 543)

Tri-County asserts that Citation's statement at the bottom of page 25 that Citation never applied for service omits Scott's testimony in which Scott stated Citation never completed a Request for Service Form for the gas plant on Tri-County's written form but Tri-County received other information from Citation in other avenues as Tri-County frequently does. (Tri 2B at 29-30, citing Tr. 539) Tri-County states that "the other information Scott referred to that appears on the Request for Service Form and which Tri-County received from Citation was location of service for the gas plant." (*Id.* at 30, citing Tr. 537-538) Tri-County states that it already had Citation's mailing address and billing information because it served Citation's office and Citation was a member of Tri-County.

Tri-County also argues that in criticizing Mr. Dew's opinion in pages 26-29 of its initial brief, Citation pays no heed to the fact the SAA does not assign service rights to Tri-County and Ameren on the basis of ownership of the electricity or of the electric distribution facilities. (Tri 2B at 31)

In response to statements on pages 29-31 of Citation's IB regarding Dr. Malmedal's testimony, Tri-County asserts that Malmedal's opinion changed and he concurred with the opinions of Dew, Tatlock and Siudyla that if Ameren owned the 12.47 kV distribution line and the transformers at the gas plant and gas compressor sites, the service point would be at the low side of the transformer and the delivery point would be at the meter, all located at the gas plant and the gas compressor sites. (Tri 2B at 33, citing Tr. 1886-1887, 1892, 1907-1908)

In Section IV of its reply brief to Citation's initial brief, Tri-County takes issue with Citation's reliance on the *Old Ben* and *Freeman Mine* cases in Section III.C of Citation's initial brief. These cases were also discussed by Ameren, and *Old Ben* was discussed by Tri-County in its response to Ameren, as discussed above.

Tri-County argues that neither the *Old Ben* nor the *Freeman Mine* decisions are applicable to this docket. (Tri 2B at 33) Regarding *Old Ben*, Docket 89-0240, Tri-County argues, "While the Commission decision was expressed in terms of what the parties intended with respect to the Partial Service Area Agreement 'otherwise entitled to serve' language, the legal basis for the Commission decision was CIPS' Section 5(b) grandfathered contractual rights as authorized by the [ESA]." Tri-County asserts, "In this docket, IP does not possess grandfathered contractual service entitlements for any part of the Salem Oil Field because the [SAA] at issue in this docket does not assign service rights on the basis of grandfathered rights or on the basis of premises and does not

incorporate into the Agreement the grandfathering provisions of Section 5 of the [ESA]." (Tri 2B at 34-35)

Tri-County states that in *Freeman Mine*, Docket ESA 187, the Commission determined the service area agreement required service rights to be determined under the ESA and since neither CIPS nor RECC had Section 5 grandfathered rights under the ESA to serve the mine, service rights would be determined under Section 8 of the ESA based upon the proximity of adequate 1965 existing lines to the proposed customer. The Commission determined CIPS had a 34.5 kV line which was required to serve the mine, in closer proximity to the mine than did RECC. Thus, the Commission awarded service rights to the mine to CIPS. (Tri 2B at 35-36)

Later, Freeman extended its mine into RECC's service territory under the agreement. Tri-County states that when RECC claimed the right to serve the new mine bore hole, the Commission found in Docket 01-0675 that service rights had already been determined for the mine in ESA 187 and on summary judgment dismissed RECC's claim on the basis of res judicata.

According to Tri-County, the *Freeman Mine* case is not applicable to this docket for a number of reasons. First, Tri-County states that the *Freeman* decision in ESA 187 was determined on the basis of the ESA and Section 8 proximity of adequate 1965 lines to the customer, and the decision in Docket 01-0675 was based solely on the decision in ESA 187 and the principal of res judicata; whereas, there has been no prior Commission prior decision assigning service rights to the Salem Oil Field.

Tri-County also states that the SAA in this docket controls the assignment of service rights, and does not assign service rights on the basis of premises or grandfathered rights or on the provisions of the ESA except Sections 2 and 6 of the Act which authorize SAAs; rather, the SAA in this docket assigns service rights on the basis of a customer's "point of delivery" in relation to the designated service territory boundary.

As another such reason, Tri-County states that IP previously successfully persuaded this Commission to hold that the same SAA provisions which are at issue in this docket do not assign service rights on the basis of grandfathered rights or premises but on the basis of point of delivery and its location in relation to the territory boundary. (Tri 2B at 36-37, citing *MJM*, Docket 93-0150)

In Section V of its reply to Citation's IB, Tri-County responds to an argument in Section III.D of Citation's IB that "the Salem Unit is a premises." (Tri 2B at 37)

Tri-County contends that whether or not the Salem unit is a premise is not a relevant factor for assigning service rights under the Tri-County/IP SAA. According to Tri-County, the SAA between Tri-County and Ameren is the controlling instrument and the Commission has already determined that the parties agreed not to assign service rights under the agreement on the basis of either premises or grandfathered rights.

Therefore, Tri-County argues, the definition of premises in the ESA is not relevant to the decision herein "nor are" the Commission decisions in *Freeman Mine,* ESA 187, which assigned CIPS initial service rights based on Section 8 proximity of adequate 1965 lines, and Docket No. 01-0675 which granted CIPS service rights to Freeman's new bore hole on the basis of the order in ESA 187 and res judicata. In Tri-County's view, to the extent the Commission's order considered the Freeman mine a premise or unit in Docket No. 01-0675, such would not make that order relevant to this docket "because the parties have agreed by their [SAA] in this docket not to assign service rights on the basis of a premises…." (Tri 2B at 37, citing Docket 93-0150)

In Section II.C of its brief in reply to Citation's responsive brief, Tri-County argues that Citation incorrectly states the evidence of Tri-County's and IP's actions regarding past oil wells in the Salem Oil Field. (Tri 3B at 14)

Tri-County states that Citation argues in Part IV on pages 15-16 that Tri-County and IP have since 1968 interpreted the SAA so as to allow IP to serve new wells since 1968 opened in Tri-County's territory. Tri-County claims that is not the evidence. Tri-County asserts that neither Ameren nor Citation raised such a "waiver" or "laches" theory in their pleadings, and neither introduced any evidence regarding this matter. Tri-County states that there is little if any evidence on this point and what there is came from Citation's cross examination of Scott (Tr. 543) as follows:

Q: Before this dispute in June of 2005 Tri-County and AmerenIP had never discussed who had a right to supply electricity to the unit operator at the Salem Unit, correct?
A: Prior to ---
Q: June 2005.
A: Not that I can recall, no.
Q: There were never any discussions about who would have the right to serve an oil well that would be newly drilled and put on pump?
A: No, I assume there was no question. We have a territorial agreement.
Q: But no discussion, correct?
A: That's correct.

Tri-County concludes, "There is no evidence to assert that prior to this docket the parties interpreted the Agreement to mean that a transformer is not a new point of delivery or that Citation has always been the same customer of IP served from the Texas Substation since the Agreement become effective." (Tri 3B at 14)

Tri-County states that at Part V on page 17 of Citation's responsive brief, Citation claims the Commission's decision in *Spoon River* does not apply because Citation has not made a new connection of its distribution system to an electric supplier. According to Tri-County, "this proposition assumes the phrase 'point of delivery,' as used in the Agreement, for the gas plant and gas compressors is the IP Texas Substation." Tri-County asserts that this assumption begs the question of whether the creation of the

service connections at the gas plant and gas compressor sites constitute a "point of delivery" under the Agreement. (Tri 3B at 15)

In Tri-County's view, the step-down transformer and connecting devices located adjacent to and connecting the gas plant and gas compressor sites to the 12.47 kV distribution line and which reduce the voltage to the appropriate level for use at each site constitutes a new "point of delivery" under the Agreement. (*Id.*)

Tri-County states that Citation claims this docket does not involve connecting its distribution system to an electric supplier and it is erroneous to interpret the Agreement in a manner that focuses on the place where the electricity is actually used. According to Tri-County, in similar situations where the customer has attempted to circumvent the service area agreement by use of the customer's own distribution line, the Commission has focused its decision on the place of usage of the electricity and not the place where the wires were connected Southwestern. (*Id.*, citing *Southwestern*, 148 Ill. Dec. 61, 66)

2. Waiver, Related Arguments and Other Issues

In Section VIII.A of its reply to Citation's initial brief, Tri-County argues that Citation's waiver and laches claims raised in its brief are affirmative matters that Citation must raise in its pleadings, 735 ILCS 5/2-613(d). Tri-County states that the rules of the Commission require an intervenor to include in the petition to intervene any affirmative relief being sought, 83 Ill. Adm. Code 200.200(a)(4) and answers must contain a concise statement of the nature of the intervenor's defense, 83 Ill. Adm. Code 200.180(b). Tri-County asserts that Citation made no attempt to raise the affirmative defenses of waiver and laches in its petition to intervene. An affirmative defense is one which gives color to the opposing party's claim and then asserts new matters which may defeat the claim. (Tri 2B at 42) Tri-County cites *Worner Agency, Inc v Doyle*, 121 Ill. App. 3d 219 (1984), "where the court held that the Defendant's claim there was a failure of consideration for a contract was an affirmative defense because if true, it would defeat plaintiff's contract claim." (Tri 2B at 42)

Tri-County argues that "matters constituting a defense to a plaintiff's complaint must be plainly set forth in the answer. See *Kermeen v. City of Peoria* 65 Ill. App. 3d 969 … (1978) where the City's defense to plaintiff's mandamus action for a building permit was that plaintiff's plans for the site did not meet drainage and fire protection standards constituted an affirmative defense which the City had not pled and plaintiff did not have notice of." (Tri 2B at 42) Tri-County asserts, "Any affirmative defense not expressly stated in the pleadings which would take the opposite party by surprise must be plainly set forth in the answer even though it may appear to be within the evidence. See *International Ass'n of Firefighters v City of East St. Louis* 213 Ill. App. 3d 91 … (1991) where the City was precluded from arguing that plaintiff's contract claim was required to be arbitrated because it was an affirmative defense the City failed to include in any pleading." Tri-County further argues, "In addition, waiver is an affirmative act *Western Casualty & Surety Co. v Brochu* 105 Ill. 2d. 486 … (1985) ["*Western Casualty*"] and must be pled as an affirmative defense." (Tri 2B at 43)

Tri-County also states that Citation has known of the dispute over the service rights at issue in this docket since March 7, 2005. Jeff Lewis, a principal manager for the Salem Oil Field, has known since at least June 22, 2005 that Tri-County would not release its service rights at issue in this case. Tri-County asserts, "Yet, Citation filed only one pleading on April 29, 2010, that being its Petition to Intervene, and still did not allege the affirmative claims of wavier or laches by Tri-County" (Tri 2B at 43), and "hardly has clean hands in this matter." (Tri 2B at 46) Tri-County also states that Ameren has not filed any pleadings alleging wavier or laches on the part of Tri-County regarding the exercise of its rights under the SAA. (Tri 2B at 43)

In Section VII.B, Tri-County argues, "The docket contains insufficient evidence to support Citation's claim of waiver and laches." (Tri 2B at 43) Tri-County states that it "had no knowledge of the creation by Citation of the gas compressor sites until 14 months into the litigation at which time Tri-County promptly filed its amended complaint to include a claim of right to serve the gas compressor sites in Tri-County's territory." (*Id.* at 44) Tri-County has made no claim for the right to serve any other "delivery points" in the Salem Oil Field and no party filed any testimony on the issues of wavier and laches because neither Ameren nor Citation raised the issues in their pleadings. (*Id.*)

Tri-County states that Citation claims Tri-County had never before requested the right to provide service to the oil wells in the Salem Oil Field citing Scott's cross examination (Tr. 543). Tri-County responds that Scott's testimony was in response to a question by Ameren whether there had ever been any discussions about electric service to any newly drilled oil well, and her reply was "no" because there was a territorial agreement. (Tri 2B at 44)

Tri-County states that Citation also claims Tri-County was aware of numerous oil wells in the Salem Oil Field and had not since 1968 claimed the right to serve any of them, citing Dew's testimony (Tr. 759) and Garden's testimony (Tr. 1702-1703). Tri-County responds that Dew's testimony (Tr. 759) refers only to the fact Tri-County has numerous distribution lines throughout the Salem Oil Field, and Garden's testimony (Tr. 1702-1703) states that Tri-County has numerous distribution lines in the Salem Oil Field and there are private residences in the Salem Oil Field. (Tri 2B at 44-45) According to Tri-County, Garden did not even know how many oil wells were in the Salem Oil Field (Tr. 1703), and Tri-County's Ivers testified Tri-County was not aware of any new wells. (Tri 2B at 44-45, citing Tr. 666)

In Tri-County's view, none of the testimony referred to by Citation supports its claims that Tri-County has rested on its rights for 35 years. Tri-County argues, "Waiver can only arise if there is an affirmative act by which one intentionally relinquishes a known right. See *Western Casualty* … 105 Ill 22 486 … (1985) where the court held an insurer did not waive its right to deny coverage to the insured even though the insurance company initially told the insured the insurance company would undertake the defense but was reserving its rights under two policy exclusions." (Tri 2B at 45)

According to Tri-County, Citation refers to no evidence in the record that either Citation or IP told Tri-County when new oil wells were established in the Salem Oil Field. Without such knowledge Tri-County could not make a knowing, intentional and conscious decision to forego a claim for service rights under the SAA to the new well. Tri-County asserts that Citation's reliance on *Illinois Valley*, Ill. App. 3d 631 (1992), is misplaced because the court only agreed that waiver or estoppel applied to Illinois Valley's claim because there was evidence of an agreement between Illinois Valley and Princeton that Princeton could provide the electric service to customers in Illinois Valley's service area in return for Princeton allowing Illinois Valley to provide electric service to its headquarters located in Princeton. Tri-County contends there is no evidence in the record in this docket of such an agreement. (Tri 2B at 45-46)

Tri-County states that Citation also claims it will lose its investment. Tri-County responds that there is no evidence regarding the amount of investment by Citation in the Salem Oil Field let alone how much if any Citation would lose should Tri-County be determined to be the proper electric supplier for the gas plant and gas compressor site in Tri-County's territory. In Tri-County's view, "Citation has failed to prove Tri-County is guilty of laches. Citation has intervened although in an untimely manner which is the fault of Citation and no one else." (Tri 2B at 46)

In Section VII of its reply to Citation's initial brief, Tri-County takes issue with the argument in Section VI of Citation's IB where Citation contends, "Citation is not bound by the unsigned terms of the membership agreement." (Cit IB at 41)

Tri-County states that Citation argues that the Citation Membership Agreement with Tri-County is unenforceable by reason of Section 80/1 of the Illinois Frauds Act ("Statute of Frauds"), 750 ILCS 80/1. According to Tri-County, Citation's claim is not well taken. Tri-County argues that the Statute of Frauds would only be applicable if Tri-County were seeking to enforce "the membership agreement" against Citation, and Tri-County has made no claim against Citation in this docket to enforce the membership agreement. Tri-County's only claim in this docket is to enforce the SAA. (Tri 2B at 39-40) Secondly, Tri-County contends that even if Tri-County were attempting to enforce the membership agreement against Citation, the Commission most likely would not have jurisdiction to hear such a claim since the Commission's jurisdiction is limited to hearing disputes between electric suppliers regarding territorial issues or disputes arising from Commission-approved service area agreements.

Tri-County further argues that "Citation's claim that Citation's membership agreement is unenforceable because it is not signed by Tri-County, fails because the Statute of Frauds only requires that the person against whom the contract is being enforced must have signed the agreement or memorandum of the agreement. (Tri 2B at 40, citing 740 ILCS 80/1; *Nassau Terrace Condo v Silverstein* 182 Ill. App. 3d 221 (1989)) Tri-County states that here, Citation claims Scott could not identify the signature on the membership agreement (Tri-County Ex A-4) noting only it was not the

signature of anyone from Tri-County. However, Citation omits the next question by Citation's counsel and Scott's answer:

Q: Is it your understanding…that's not a signature of someone at [TCEC]?
A: That is correct. That is a signature by someone at Citation." (Tr. 563)

Tri-County states that Citation also omits the same questions by Ameren's counsel and Scott's answer (Tr. 507-508):

Q: Have you seen Exhibit A-4 before?
A: Yes.
Q: And is this the application of membership and agreement for purchase of electric service?
A: Yes.
…
Q: And this was signed by Citation?
A: Yes.
Q: And this was for electric service just to the office complex?
A: Yes.

Tri-County states that the testimony by Scott that the signature on the Membership Application and Agreement (Tri-County Ex A-4) is someone from Citation was not contradicted or rebutted. Thus, Tri-County argues, the evidence in the record is that Citation did sign the Application and Agreement and Citation cannot raise the Statute of Frauds as a defense to a claim by Tri-County on this Agreement. (Tri 2B at 41)

In Section II.I, Tri-County responds to arguments on page 14 of Citation's IB that for safety reasons, the supplier of electricity to the gas plant should be the same supplier that provides electricity to the wells. According to Tri-County, Citation's argument is not supported by the evidentiary record which shows that Citation already suffers electric outages on all four circuits of its 12.47 kV distribution line and has in place safety mechanisms to protect its equipment when outages occur on a particular circuit shutting down one or more gas wells or the gas plant or vice versa. (Tri 2B at 16-17)

IX. APPLICABILITY OF THE CONSUMER CHOICE LAW ("CCL")

A. Citation Position

Section II of Citation's initial brief is titled, "Citation has a statutory right to choose its electric supplier notwithstanding the terms of the SAA." Section II.A is titled, "Applicability of the Consumer Choice Law." In Section II.B, Citation states that in 1997 the General Assembly enacted the Electric Service Customer Choice and Rate Relief Act of 1997 ("Customer Choice Law" or "CCL"), 220 ILCS 5/16-101 et. seq. The stated

purpose of the CCL was to introduce competition into the Illinois electricity market, 220 ILCS 5/16-101(A)(b). (Cit IB at 6)

The CCL became effective December 16, 1997, and required large electric utilities like IP to provide "delivery services" to certain sized customers on or before October 1, 1999, 220 ILCS 5/16-104(a). (Cit IB at 7)

Citation states that it was "a retail customer of IP on October 1, 1999, i.e., Citation was receiving and it was eligible to receive tariffed delivery services from IP at the Texas Substation within the meaning of Sec. 16-102." (Cit IB at 9)

Citation claims it "has a valid statutory property interest to choose its electric supplier (220 ILCS 16/104 and 16-101(A)) that the Commission is not authorized to curtail or abolish" which preempts any SAA contract dispute between Tri-County and Ameren. (*Id.* at 9-10)

Citation submits that 220 ILCS 5/9-102 requires public utilities such as Ameren to file tariffs with the Commission and Ameren has a delivery tariff that Citation subscribes to for delivery services. (*Id*. at 10)

In Section II.B, Citation argues, "Citation owns the electricity and has the right to use it without interference from TCEC." (Cit IB at 10) Citation contends that the CCL gave Citation the property right to buy electricity from an ARES, and as owner of that right and of the electricity, Citation had the right to use the electricity for its own purposes in any way it wanted. (*Id.* at 11)

In Section II.C, Citation argues that "the SAA cannot be interpreted to deprive Citation of its property." (Cit IB at 12) Citation states that Tri-County is a cooperative, and the CCL "does not apply to cooperatives (220 ILCS 5/17-110) unless the cooperative files a Notice of Election with the Commission to allow the customer access to an ARES (220 ILCS 5/17-200(b))." (Cit IB at 12) Citation submits that without the election, the customer of a cooperative is required to receive bundled electric service and cannot purchase power from an ARES, and Tri-County's prayers for relief request the Commission to determine that Tri-County has the exclusive right to provide all electricity to the gas plant and compressors. (Cit IB at 12)

If the Commission were to declare Tri-County to be the electric provider for the gas plant and the seven compressors, Citation recommends that certain conditions be imposed, including "TCEC waiving its exemption under Sec. 17-100 and allowing Citation the option to purchase power for the gas plant and 7 compressors from an ARES as set forth in 220 ILCS 17-200." (Cit IB 15)

In Section II.D of its initial brief, Citation contends "TCEC seeks relief that would unconstitutionally impair the obligation of contracts." Citation argues that under the CCL, a non-residential consumer has the right to choose its electric supplier, that Citation is currently under a contract to purchase electricity for the Salem Unit from AEM

which includes the gas plant and 7 compressors, and that to impair that right would violate the Contracts Clauses of the United States and Illinois Constitutions. (Cit IB at 15-16, citing U.S. Const. Art I, Sec 10)

In Section II.E, Citation argues, "If there is a conflict between the ESA and CCL, then the CCL prevails" because it is the more specific and the more recent statutory provision. (Cit IB at 17-21)

In Section II.F, Citation argues that "the Commission does not have the authority to annul Citation's right to choose its electric supplier." Citation asserts that "no statute allows the Commission to abrogate Citation's right to choose an ARES." (Cit IB at 21)

B. Tri-County Response

In Section II.A of its reply brief to the Citation IB, Tri-County argues that the clear provisions of the Electric Service Customer Choice and Rate Relief Act of 1997 exclude rural electric cooperatives and municipal electric systems from the Act. (Tri 2B at 4)

Tri-County argues, "Not only are electric cooperatives excluded from the [CCL] Act (220 ILCS 15/17-100), the [CCL] specifically states it shall not be construed to conflict with the rights of an electric cooperative as declared in the Electric Supplier Act (220 ILCS 5/17-600)." (Tri 2B at 4-5)

That is, "It is very clear the Legislature did not intend to apply the [CCL] and its 'customer choice' provisions to consumers of electric cooperatives unless the governing board of the electric cooperative authorized the same (220 ILCS 5/17-200) and it is clear Tri-County Electric Cooperative, Inc. as an electric cooperative has not made that election." (Tri IB at 47-48, citing Tri Ex. H at 6-8; Tr. 498)

Tri-County states that Citation contends the CCL defines "delivery services" as those services provided by an "electric utility" (220 ILCS 5/16-104(a)) and have to be provided to all non-residential customers by December 31, 2000. In response, Tri-County asserts that it is not by definition an "electric utility" under the CCL.

Section 5/16-102 of the Act defines "electric utilities" as a "public utility" as defined in 220 ILCS 5/3-105(b)(3) which in turn excludes electric cooperatives as defined in the Electric Supplier Act (220 ILCS 5/3-105(b)(3); 5/3-119, and 220 ILCS 30/3.4). Tri-County further submits, "Not only are electric cooperatives excluded from the [CCL] (220 ILCS 15/17-100), the Act specifically states it shall not be construed to conflict with the rights of an electric cooperative as declared in the [ESA] (220 ILCS 5/17-600)." (Tri 2B at 4-5)

In Section I.D of its reply to Citation's initial brief, Tri-County argues that even if Citation has a right under the CCL to receive electricity from an ARES, the right is conditioned by the statute upon Ameren being the appropriate electric supplier to provide electric service to Citation. The right of Ameren to continue to provide electric

service to the Citation gas plant and seven of the eight gas compressor sites is dependent upon which of Tri-County or Ameren has that right under the ESA and the Tri-County/IP Commission-approved SAA. (Tri 2B at 8-9)

Tri-County states that Citation's claim to a property interest in the right to purchase electricity from an ARES is based solely on the provisions of the CCL that govern "public utilities" such as Ameren, and that Citation ignores those provisions of the CCL that govern the right of customers of electric cooperatives and municipal electric systems to purchase electricity from an ARES. Tri-County asserts that the CCL is clear and precise on what a customer's rights are in that regard (220 ILCS 5/17-100, 17-200 and 17-600), and it does not give Citation an absolute right to purchase electricity from an ARES when Citation is a customer of Tri-County, an electric cooperative. Tri-County argues, "Since the [CCL] does not provide Citation with such absolute right, Citation cannot claim the [CCL] provides Citation with a statutory property interest to purchase electricity from an ARES." (Tri 2B at 9, 13)

In Section II.G, in response to arguments in Section II.C of Citation's initial brief, Tri-County states that there is no evidence in the record that Citation asked Tri-County if it would allow Citation to purchase energy for the gas plant and gas compressors from an ARES. Thus, Citation's argument on this point is speculation. The issue of who is the appropriate electric supplier for the gas plant and gas compressor has yet to be decided. According to Tri-County, not until that is decided can any consideration be given to elections under 220 ILCS 5/17-200 by Tri-County regarding Citation's purchase of power from an ARES. (Tri 2B at 14)

In Section II.J, Tri-County responds to Citation's contention on page 15 of its initial brief that if the Commission were to declare Tri-County to be the electric provider for the gas plant and the seven compressors, certain conditions should be imposed, including "TCEC waiving its exemption under Sec. 17-100 and allowing Citation the option to purchase power for the gas plant and 7 compressors from an ARES as set forth in 220 ILCS 17-200."

Tri-County responds that none of the requests for conditions "are within the jurisdiction of the Commission to award or order performed" and none are supported by the evidence. (Tri 2B at 17-18)

In Section II.K of its reply to Citation's initial brief, Tri-County responds to Citation's argument in Section II.D of Citation's IB that "TCEC seeks relief that would unconstitutionally impair the obligation of contracts."

Tri-County responds that Citation knowingly entered into the ARES contracts and now "brazenly" claims a Commission decision awarding service rights to the gas plant and the gas compressor sites will unconstitutionally impair its ARES contract. The contract Citation claims would be unconstitutionally impaired post-dates the Electric Supplier Act, the Tri-County/IP SAA, and the litigation in this docket. Tri-County argues, "Therefore, the application of the [ESA] and the Tri-County/IP [SAA] to the issues in this

docket cannot possibly impair Citation's ARES contract because the [ESA] predates Citation's ARES contract." Tri-County further argues, "As noted in *Commonwealth Edison v [ICC]* 398 Ill App 3d 510 … 338 Ill. Dec. 539, 561 (2009) '…the underlying purpose of the contract clause is to protect the expectations of persons who enter into contracts from the danger of subsequent legislation.' Citation points to no legislation which was adopted after December 2008 and which will be applied by the Commission to the issues in this docket." (Tri 2B at 19-20)

In Section II.E of its IB, Citation argues, "If There is a conflict between the ESA and CCL, then the CCL prevails." (Cit IB at 17)

In Section II.L of its reply brief, Tri-County responds that there is no conflict between the CCL and the ESA. (Tri 2B at 21) According to Tri-County, Citation cannot point to any provision of the CCL that authorizes Citation as a customer of Tri-County to unilaterally choose its electric supplier. Tri-County argues, "In fact, the [CCL] specifically provides to the contrary unless Tri-County elects to allow its customers to purchase power from an ARES (220 ILCS 5/17-100 and 5/17-200)." Tri-County adds, "In so doing the Legislature put in place a statutory scheme that recognized the inherent differences between rural electric cooperatives and municipal electric systems on the one hand and electric utilities on the other hand…." (Tri 2B at 24)

Tri-County submits that the subject matter of the ESA deals only with electric supplier service territories and the assigning of rights of electric suppliers to serve customers in those territories. Tri-County concludes, "Thus, the two statues which regulate two different subject matters are not in conflict with each other. Each statute establishes regulatory schemes intended to meet separate and distinct governmental needs." (Tri 2B at 25)

In Section II.B of its initial brief, Citation argues that the Commission does not have the authority to annul Citation's right to choose its electric supplier.

In Section II.M of its reply brief, Tri-County responds that the Commission has the specific power under the ESA to approve and interpret the SAA Agreement at issue in this docket. (Tri 2B at 25)

According to Tri-County, Citation's right to choose an ARES under the CCL is not the issue in this docket. The issue is which of Tri-County or Ameren is entitled to serve Citation's gas plant and gas compressor sites in Tri-County's service territory. In Tri-County's view, because that is the only issue, the Commission has authority to decide the same. (Tri 2B at 24-25, citing 220 ILCS 30/2 and 30/6) Tri-County further asserts that if the Commission determines Tri-County is the appropriate electric supplier, the Commission will not abrogate Citation's right to purchase power from an ARES. Tri-County argues, "Rather, Citation's right to purchase power from an ARES under the [CCL] will be a matter between Tri-County and Citation and beyond the purview of the Commission. That is the regulatory structure established by the Legislature and the Commission will not be exerting any authority over the subject matter of that transaction

(220 ILCS 5/17-500)." In this docket, the Commission is requested to render an order regarding the appropriate electric supplier, not whether Citation can choose its power provider under the CCL. (Tri 2B at 25)

X. COMMISSION ANALYSIS AND CONCLUSIONS

A. Background

On March 18, 1968, Illinois Power Company, n/k/a Ameren Illinois, and Tri-County Electric Cooperative entered into a Service Area Agreement ("SAA") pursuant to the Electric Supplier Act. They did so "for the purpose of defining and delineating, as between themselves, service areas in which each is to provide electric service." The Agreement was approved by the Commission on July 3, 1968.

In the instant proceeding, Tri-County filed a complaint against Ameren Illinois pursuant to the Electric Supplier Act, and then an amended complaint which was further amended in 2012.

The Ameren Texas Substation was built in 1952 and is located within the service area assigned to Tri-County in the SAA. Approximately 90 percent of the Salem Oil Field, now operated by Citation, is also located within the service area assigned to Tri-County in the SAA. On the surface, the Salem field encompasses approximately 14 square miles. The Citation gas plant and the seven compressors at issue in this proceeding were built or installed by Citation in 2005 and are also located within the service area assigned to Tri-County in the SAA.

After it became the Salem Unit Operator in 1952, Texaco constructed its own electric distribution system in the Salem Unit and operated that system until the unit was sold to Citation in 1998. Pursuant to contracts beginning in 1955, IP provided electrical power to Texaco at a connection point at the Texas Substation. From there Texaco continuously distributed the power, over its own distribution system, to its electrical equipment at numerous sites, in the Salem field, that were located in the area that was eventually assigned to Tri-County in the SAA in 1968.

After the SAA went into effect in 1968, nothing changed with respect to the arrangement described above. That is, Texaco continued to use its distribution system to distribute electricity, obtained from IP at the Texas Substation, to the Salem Oil Field facilities, including new wells, located in the area assigned to Tri-County.

In approximately December of 1998, Texaco sold the Salem Unit to Citation. The sale included the electrical energy distribution system that Texaco built and operated. Citation and IP entered into an electrical service contract on December 14, 1999 and again on December 14, 2004. As Texaco had done, Citation used the distribution system to distribute electricity, obtained from AmerenIP at the Texas Substation, to the Salem Oil Field facilities located in the area assigned to Tri-County.

The record indicates that from January 1, 1970 to 2010, the Salem Unit Operator, Texaco and then Citation, drilled, completed and connected at least 98 new producing oil wells, and two electrified central pumping stations, to their existing electric distribution system. The Salem Unit Operator, Texaco and then Citation, used its distribution system to distribute electricity, received at the Ameren Texas Substation, to those new wells and facilities situated in the Tri-County service area. Tri-County has not served any of those facilities other than the Citation office complex at any time.

B. Analysis

The current dispute arose when Citation constructed a gas plant and seven compressors in Tri-County's territory and rebuilt and extended its distribution line so that it could move electricity from the Texas Substation to the new gas plant.

Section 3(a) of the SAA provides, in part, "Except as otherwise provided in or permitted by this Section …, each party shall have the exclusive right to serve all customers whose points of delivery are located within its Service Area and neither party shall serve a new customer within the Service Areas of the other party." (Tri Ex. A-1)

Section 3(b) of the SAA provides, "Each party shall have the right to continue to serve all of its existing customers and all of its existing points of delivery which are located within a Service Area of the other party on the effective date."

Section 1(b) of the SAA provides, "'Existing customer' as used herein means a customer who is receiving electric service on the effective date hereof."

Section 1(c) provides, "'New customer' as used herein means any person, corporation, or entity, including an existing customer, who applies for … electric service at a point of delivery which is idle or not energized on the effective date of this Agreement."

Section 1(d) states, '"Existing point of delivery' as used herein means an electric service connection which is in existence and energized on the effective date hereof. Any modification of such electric service connection after the effective date hereof by which an additional phase or phases of electric current are added to the connection, shall be deemed to create a new point of delivery."

Tri-County focuses on the term "delivery point" or "point of delivery" as used in Section 3 of the SAA. In Tri-County's view, the point where the Citation distribution system connects with and takes power from the Ameren system at the Ameren Texas Substation is not a point of delivery under the SAA.

Relying primarily on the testimony of consulting electrical engineer Robert Dew, and to some degree on other engineering witnesses, Tri-County contends that a "point of delivery" as customarily used within the electric utility industry normally consists of a step-down or distribution transformer located adjacent to the site where the customer

intends to utilize the electricity so that the electricity received from the 12.47 kV distribution line can be reduced to a voltage usable by the customer's facilities at the site.

Therefore, in Tri-County's view, each of the step-down transformers and associated apparatus located adjacent to the Citation gas plant and to each of the gas compressor sites which are used to reduce the 12.47 kV on the Citation-owned distribution line to 277/480 volts for use by the electric facilities at the gas plant and gas compressor sites constitute new "delivery points" within the meaning of the March 18, 1968 SAA. Tri-County argues, "Consequently, Citation, as an existing customer of IP, becomes a 'new customer' by reason of establishing the new electric points of delivery that did not exist on March 18, 1968." (Tri IB at 30-31) As such, Ameren would not be entitled to any alleged grandfather protections under Section 3(b).

In somewhat of a preliminary argument, Ameren asserts that the phrase "point of delivery" as used in the SAA is clear and unambiguous, and therefore, the extrinsic evidence in the form of opinion testimony from Mr. Dew must be ignored. In arriving at its interpretation of the phrase, Ameren essentially strings together dictionary definitions for each of the individual words in the phrase. The record shows, however, that Ameren, and Citation, also introduced extrinsic evidence to interpret the phrase "point of delivery," such as definitions in tariffs and other contracts, Ameren engineering testimony and "practical construction" or "course of conduct" contentions that Tri-County "stood by for 37 years" while Texaco and Citation repeatedly extended the distribution system to new pumps for 98 new wells. Ameren's argument that Mr. Dew's testimony must be ignored while Ameren's own extrinsic evidence should be considered is not consistent and will not be adopted. Accordingly, his testimony will be duly considered along with the other evidence and arguments in the case, as will evidence adduced by Tri-County regarding statements by AmerenIP employees prior to the construction of the Citation gas plant and compressors.

Having reviewed the record, the Commission finds that the point at the Ameren Texas Substation where Citation's distribution system connects to and takes power from the Ameren system is a "point of delivery" under Section 3(b) of the SAA. While Tri-County's competing interpretation of point of delivery is well explained in its testimony and briefs, and warrants consideration, the Commission believes that application of it to the circumstances in this case would produce a result that was not intended by the parties to the Agreement at the time it became effective.

As noted above, at the time the SAA took effect, IP was providing electricity to Texaco, by means of the point of connection at the Texas Substation. From there the power was distributed by Texaco over its distribution system to sites, both new and existing, that were located in areas within the Salem Oil Field which were assigned to Tri-County in the SAA. To accept Tri-County's interpretation of point of delivery as used in the SAA would mean the parties intended to immediately preclude IP from continuing its long-standing practice of supplying electricity to Texaco, at the Texas Substation, for distribution by Texaco to new wells and pumps sited in Tri-County's area.

Such an interpretation is undermined by the actions or conduct of Ameren and Tri-County after the SAA took effect. Texaco simply continued to do what it had been doing, i.e., using its distribution system to distribute electricity, obtained from IP at the Texas Substation, to the Salem Oil Field facilities located in the area assigned to Tri-County. Presumably, if Tri-County believed the newly signed SAA was intended to put an end to such deliveries into what had just become its service area, its management then in place would have made that position known, but it did not. From then, 1968, until 2005 and thereafter, IP continued to supply Texaco and then Citation with electricity at the Texas Substation, for delivery by Texaco and Citation to at least 98 new oil wells and associated pumping equipment in the Tri-County area of the Salem field, all without resistance from Tri-County until it objected in 2005.

Given these practical construction considerations, it appears Ameren's point of connection with the Salem operator's distribution system at the Texas Substation was intended by the parties to the SAA to be considered a point of delivery under the grandfather clause in Section 3(b). Inasmuch as the dispute in the current case similarly involves the movement of electricity by Citation, over its own distribution system, from the connection point at the Texas Substation -- where it takes the electricity from Ameren -- to Citation facilities in the Salem Oil Field, it is reasonable to treat the connection as a point of delivery under those grandfather provisions in Section 3 of the SAA.

The Commission also agrees with Ameren that the *MJM* decision in Docket 93-0150, relied upon by Tri-County, involved different facts and does not defeat Ameren's grandfather rights in Section 3(b) of the SAA. In *MJM*, unlike the present case, the customer did not operate its own electric distribution system and neither supplier in *MJM* had served the property for a 13-year period preceding the connection which gave rise to the dispute.

The Commission also believes the *Unimin* decision in Docket 88-0276, cited by Tri-County is distinguishable. There is no indication that the parties to the service area agreement in *Unimin*, or in *MJM*, engaged in a practical construction of those agreements similar to that applied by the parties in the instant case, which involves a sprawling oilfield operation where the Citation distribution system has been used for decades to move electricity from the Texas Substation to numerous and constantly evolving well sites in Tri-County's area, as described above.

As noted above, Section 1(d) of the SAA states, '"Existing point of delivery' as used herein means an electric service connection which is in existence and energized on the effective date hereof." It then states, "Any <u>modification</u> of such electric service connection after the effective date hereof by which an additional phase or phases of electric current are added to the connection, shall be deemed to create a new point of delivery." (Emphasis added)

Tri-County argues that if the Ameren Texas Substation is determined to be the delivery point of electric service for the Citation Salem Oil Field -- which Tri-County disputes as explained above -- then Ameren "has modified its Texas substation such that it constitutes a new point of delivery." (Tri IB at 42) In making this "modification" argument under Section 1(d) of the SAA, Tri-County contends, and the Commission agrees, that Tri-County has not conceded or waived any of its other positions in the case.

Tri-County witness Mr. Dew testified there have been numerous "modifications" to the Texas Substation since the 1968 Service Area Agreement which have enabled Ameren to serve additional electric loads for customers through the Texas Substation. Mr. Dew opined that each time Ameren modifies its Texas Substation so that it can serve additional load, whether for an existing customer or a new customer, it creates a new point of delivery or a new service connection point at the Texas Substation within the engineering meaning of Section 1(d) of the Agreement.

Ameren states that Mr. Dew's position, if correct, would arguably nullify an otherwise "existing point of delivery" and defeat a Section 3(b) grandfather right to continue to serve what would otherwise constitute "existing points of delivery ... located within a Service Area of the other party...." (Am IB at 21-22)

Ameren argues, and the Commission agrees, that no "modification" as defined in Section 1(d) of the SAA, whereby "an additional phase or phases of electric current are added to the connection," has occurred. Simply stated, there have been no additional phases of electric current added to the three-phase connection that was in place at the time the SAA took effect. Therefore, any otherwise applicable grandfather rights under Section 3(b) have not been relinquished.

Tri-County witnesses also testified that they interpreted Citation's discussions and other communications as a "request" by Citation for electric service for the gas plant. If Tri-County is actually claiming Citation made such a request, that position is not supported by the record. As explained by Ameren, Tri-County and Citation had discussions and other communications and Tri-County provided an estimate of the cost to extend Tri-County's electric facilities to the gas plant, but Citation did not communicate any acceptance of that offer to construct the line or otherwise request such service, and Tri-County did not begin construction of any such line or take similar actions relating thereto.

C. Other Arguments

Ameren and Citation also refer to testimony by Mr. Lewis of Citation that for safety reasons, Citation prefers that the supplier of electricity to the gas plant is the same as the supplier of electricity to the wells. In reaching its decision in this case, the Commission has not given consideration to this argument. First of all, Tri-County has explained that Citation already has in place safety mechanisms to protect its equipment when outages occur on a particular circuit shutting down one or more gas wells or the

gas plant or vice versa. Further, the Commission is called upon by the Electric Supplier Act to determine rights, under the SAA, as between the parties to the SAA. The parties to the SAA are Tri-County and Ameren. The preferences of Citation for one supplier or the other, and the reasons for those preferences, are not part of that analysis.

In its brief, Citation also briefly argues that Tri-County's complaint should be barred under the theories of waiver and laches. The Commission notes that the parties to the SAA are Tri-County and Ameren. Citation does not explain how it, as a non-party to the SAA, has standing to assert that Tri-County's rights under its agreement with Ameren have been waived.

Citation also argues in its brief that Tri-County should have named Citation as a necessary party to the proceeding, and should now be barred and estopped from asserting its rights in the proceeding. As noted by Tri-County, Citation was well aware of the dispute and of the filing of Tri-County's complaint. Citation employees were also witnesses for Ameren. Citation could have filed a petition for leave to intervene at that time but chose not to, relying instead on Ameren. Also, Citation cites no Commission ESA proceeding where the customer was named as a "necessary party." Citation's position that Tri-County should be barred from asserting its rights under its SAA with Ameren will not be adopted.

D. Customer Choice Law

Citation also contends that it has a statutory right to choose its electric supplier under the Electric Service Customer Choice and Rate Relief Act of 1997 ("Customer Choice Law" or "CCL"), 220 ILCS 5/16-101 et seq., "notwithstanding the terms of the SAA" between Ameren and Tri-County. The CCL is part of the Public Utilities Act ("PUA").

In response, Tri-County argues that the clear provisions of the CCL exclude rural electric cooperatives and municipal electric systems from the Act.

Tri-County argues, "Not only are electric cooperatives excluded from the [CCL] (220 ILCS 5/17-100), the [CCL] specifically states it shall not be construed to conflict with the rights of an electric cooperative as declared in the Electric Supplier Act (220 ILCS 5/17-600)." (Tri 2B at 4-5)

That is, "It is very clear the Legislature did not intend to apply the [CCL] and its 'customer choice' provisions to consumers of electric cooperatives unless the governing board of the electric cooperative authorized the same (220 ILCS 5/17-200) and it is clear Tri-County Electric Cooperative, Inc. as an electric cooperative has not made that election." (Tri IB at 47-48)

Having reviewed the arguments, the Commission agrees with Tri-County that Citation does not have a statutory right to choose its electric supplier under the CCL "notwithstanding the terms of the SAA."

Section 17-100 of the CCL, cited by Tri-County, states, in part, "Electric cooperatives, as defined in Section 3.4 of the Electric Supplier Act … shall not be subject to the provisions of this amendatory Act of 1997, except as hereinafter provided in this Article XVII."

Section 17-600, also cited by Tri-County, provides, "Except as expressly provided for herein, this Article XVII shall not be construed to conflict with the rights of an electric cooperative or a municipal system as declared in the Electric Supplier Act or as set forth in the Illinois Municipal Code or the public policy against duplication of facilities as set forth therein."

As also indicated by Tri-County, Section 17-200(a) provides, in part, "An electric cooperative or municipal system each may, by appropriate action and at the sole discretion of the governing body of each, from time to time make one or more elections to cause one or more of the existing or future customers of each respective system to be eligible to take service from an alternative retail electric supplier for a specified period of time."

As explained by Tri-County, such elections are made at the "sole discretion of the [cooperative's] governing body," and Tri-County has not made such an election. Accordingly, Citation's argument that it has a statutory right to choose its electric supplier under the CCL "notwithstanding the terms of the SAA" is not correct and will not be adopted.

E. Conclusion

For the reasons explained in Section X.B above, Tri-County's Amended Complaint against Ameren Illinois under the Electric Supplier Act should be denied as hereinafter set forth.

XI. FINDINGS AND ORDERING PARAGARAPHS

The Commission, having considered the entire record herein, is of the opinion and finds that:

(1) the Commission has jurisdiction over the Parties and the subject matter herein;

(2) the facts recited and conclusions reached in Section X of this Order above are supported by the record and are hereby adopted as findings of this order;

(3) the Complaint as amended should be denied as hereinafter set forth.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the Complaint filed and amended by Tri-County Electric Cooperative, Inc. is denied.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Act and 83 Ill. Adm. Code 200.880, this Order is final; it is subject to the Administrative Review Law.

DATED: May 28, 2015

Larry Jones
Administrative Law Judge